Supreme Court, U.S.
FILED
(1)

No. 97 1145 JAN - 8 1998

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

In Re Assassination Records Review Board Subpoena to Harry F. Connick

HARRY F. CONNICK, Assassination Records Review Board Subpoena to,

Petitioner,

v.

UNITED STATES OF AMERICA, on behalf of the Assassination Records Review Board,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

WESSEL & ASSOCIATES
WILLIAM F. WESSEL
Counsel of Record
CHARLOTTE A. LAGARDE
127 Camp Street
New Orleans, LA 70130
(504) 568-1112
(504) 568-1208 (Fax)

and

VICTORIA LENNOX BARTELS
127 Camp Street
New Orleans, Louisiana 70130
(504) 568-1112
(504) 568-1208 (Fax)
Attorneys for Petitioner
Harry F. Connick

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

82 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does Harry F. Connick, District Attorney in and for the Parish of Orleans, State of Louisiana, hold "government office" within the intendment of the "President John F. Kennedy Assassination Records Collection Act of 1992"?

2. Are the documents within the custody and control of Harry F. Connick, which documents were created in connection with a purely local investigation into the assassination of President Kennedy, "assassination records" within the intendment of the "President John F. Kennedy Assassination Records Collection Act of 1992"?

3. Does the power to request the issuance of subpoenas conferred upon the Assassination Records Review Board by the "President John F. Kennedy Assassination Records Collection Act of 1992" extend to a subpoena which is not connected with or in aid of the Board's fulfillment of its singular responsibility to "review a determination by a Government office to seek to postpone disclosure of assassination records"?

4. May the Assassination Records Review Board use a subpoena duces tecum as a vehicle to wrest possession of original documents relating to the assassination of President Kennedy, which records of a Louisiana state criminal prosecution are owned by the State of Louisiana, from the duly elected state official who is custodian of those records, and thereby transmit possession and/or ownership of these original documents to the National Archives?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2

I. Course of the Proceedings Below 2

II. Statement of Facts 3

REASONS FOR GRANTING THE WRIT 7

I. The President John F. Kennedy Assassination Records Collection Act of 1992 was never intended by Congress to apply to Harry F. Connick, District Attorney in and for the Parish of Orleans, State of Louisiana, or to the local records of which he is custodian by virtue of his public office. The application of the terms of the "Act" to Mr. Connick by the U.S. Fifth Circuit erroneously decided important issues of federal law which should be settled and corrected by this Court 7

II. The departure from ordinary subpoena practice sanctioned by the decision of the U.S. Fifth Circuit Court of Appeals requires the exercise of this Court's supervisory power 14

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES:

Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983) 11

Board of Levee Commissioners of the Orleans Levee Board v. Huls, Civil Action No. 84-3901, 1987 USDC Lexis 8561 (E.D. La.1987) 15

Burlington Northern Railroad Co. v. Office of Inspector General, Railroad Retirement Board, 983 F.2d 631 (5th Cir. 1993) 16

Federal Trade Commission v. Turner, 609 F.2d 743 (5th Cir. 1980) 16

National Latino Medical Coalition v. F.C.C., 816 F.2d 785 (D.C. Cir. 1987) 11

Nixon v. United States, 978 F.2d 1269 (D.C. Cir. 1992) 18

Public Citizen v. Burke, 843 F.2d 1473 (D.C. Cir. 1988) 10

Smith v. Russellville Production Credit Assn., 777 F.2d 1544 (11th Cir. 1985) 11

U.S. Dept. of Labor v. Kast Metals Corp., 744 F.2d 1145 (5th Cir. 1984) 11

U.S. v. Walter Dunlap & Sons, Inc., 800 F.2d 1232 (3rd Cir. 1986) 11

STATUTES AND/OR FEDERAL RULES:

"President John F. Kennedy Assassination Records Collection Act of 1992" Pub.L. 102-526 §§ 1 to 14, Oct. 26, 1992, 106 Stat. 3443-3458, as amended Pub.L. 103-345, §§ 2 to 5a, Oct. 6, 1994, 108 Stat. 3128-3130 ..... 2, 7, 10

TABLE OF AUTHORITIES – Continued

Page

Sec. 2 19

Sec. 3(2) 12

Sec. 3(2)(E) 13

Sec. 3(5) 7, 9

Sec. 4(a) 8

Sec. 4(a)(2)(A)(i) and (ii) 8

Sec. 5(a) 8

Sec. 5(c) 8

Sec. 5(e) 8

Sec. 7(i)(1) 15, 16

Sec. 7(i)(2) 15

Sec. 7(j)(C)(iii) 15

Sec. 7(n) 11

Sec. 10(a) 5

"Presidential Recordings and Materials Preservation Act", Pub.L. 93-526, § 1, Title I, §§ 101 to 106, Dec. 19, 1974, 88 Stat. 1695-1698, as amended Pub.L. 98-497, Title I, § 107(c), Oct. 19, 1984, 98 Stat. 2291 10

PRMPA § 105(c) 18

Federal Rules of Civil Procedure, Rule 45(a)(C) 17

La. Public Records Law, LSA – R. S. 44:1 ..... 13, 16

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS:

36 C.F.R. Ch. XIV, Part 1400, §§ 1400.1-1400.8 .....2, 9

36 CFR § 1400.1(b)(2) 11

36 C.F.R. § 1400.2(a) 11

36 C.F.R. § 1400.6. 20

36 C.F.R. § 1400.7(a) 8, 12

STATE DECISIONS:

Richardson & Bass v. Board of Levee Commissioners of the Orleans Levee District, 231 La. 299, 91 So.2d 353 (La. 1956) 16

PETITION FOR WRIT OF CERTIORARI

Harry F. Connick respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *In Re Assassination Records Review Board Subpoena to Harry F. Connick*, 124 F.3d 718 (5th Cir. 1997) (App. 1).

JURISDICTION

This case arises out of an administrative subpoena issued at the request of the Assassination Records Review Board (hereinafter referred to as the ARRB) and directed to Harry F. Connick, District Attorney in and for the Parish of Orleans, State of Louisiana. The "President John F. Kennedy Assassination Records Collection Act of 1992", which created the ARRB, conferred jurisdiction to enforce the administrative subpoenas of the ARRB to "any appropriate Federal court . . . " Pub. L. 102-526, Stat. 3443-3458, as amended Pub. L. 103-345, 108 Stat. 3128-3130, at § 7(j)(2). Harry F. Connick resides and holds public office in the Eastern District of Louisiana, giving the United States District Court for the Eastern District of Louisiana original jurisdiction over both Mr. Connick's

Motion to Quash the subpoena and the ARRB's request to enforce it.

Mr. Connick's appeal from the "Order & Judgment" of the district court dated June 25, 1996 was timely filed on July 3, 1996. The opinion of the United States Court of Appeals for the Fifth Circuit was rendered on October 10, 1997. Pursuant to Supreme Court Rule 13.1, this petition has been timely filed within 90 days of the rendition of judgment herein by the Fifth Circuit Court of Appeal.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

"President John F. Kennedy Assassination Records Collection Act of 1992", Pub.L. 102-526 §§ 1 to 14, Oct. 26, 1992, 106 Stat. 3443-3458.

36 C.F.R. Ch. XIV, Part 1400 – "Guidance for Interpretation and Implementation of the President John F. Kennedy Assassination Records Collection Act of 1992 (JFK Act)"

STATEMENT OF THE CASE

I. Course of the Proceedings Below

This case arises out of an administrative subpoena duces tecum issued at the request of the Assassination Records Review Board (hereinafter referred to as the ARRB) and directed to Harry F. Connick, District Attorney in and for the Parish of Orleans. The subpoena

directed Mr. Connick to appear on February 16, 1996, in Washington D.C. and produce any and all records in his possession "relating to the assassination of President John F. Kennedy, including, but not limited to, any records relating to the investigation and prosecution of Mr. Clay Shaw by the former New Orleans District Attorney, Jim Garrison." ARRB Subpoena to Harry F. Connick, Exhibit "A", reprinted herein at App. 7.

On February 15, 1996, Mr. Connick filed a Motion to Quash said subpoena in the United States District Court for the Eastern District of Louisiana. Subsequently, on March 7, 1996, the United States of America, on behalf of the ARRB, filed a Petition for Summary Enforcement of Administrative Subpoena in the United States District Court in and for the Eastern District of Louisiana. These two matters were consolidated.

On June 12, 1996, a final hearing was conducted upon the requests for relief of both parties. As a result of this hearing, the district court ordered Mr. Connick to turn over to the ARRB the originals of all documents in his possession which were responsive to the requests contained in the subpoena. The ARRB was ordered only to return duplicates to Mr. Connick. A final judgment to this effect was signed on June 25, 1996, App. 8. Mr. Connick filed his Notice of Appeal on July 3, 1996, App. 11. The U.S. Fifth Circuit Court of Appeals rendered a decision on October 10, 1997, affirming the order of the district court. App. 1.

II. Statement of Facts

In the late '60s, former N.O. District Attorney Jim Garrison conducted a much publicized criminal prosecution of Clay Shaw for violation of state law in connection

with his alleged participation in a conspiracy to assassinate President John F. Kennedy. As a result of the trial of those charges, Mr. Shaw was acquitted. At issue in these proceedings are the records of Mr. Garrison's investigation and prosecution of Clay Shaw.

In 1974, when Mr. Connick replaced Mr. Garrison as New Orleans District Attorney, he became Custodian of all of the records of that office on behalf of the State of Louisiana, including the records of Mr. Garrison's prosecution of Mr. Shaw. Over the years, certain dispositions of some of this property have taken place. As a part of the general culling of grand jury transcripts,[1] Mr. Connick ordered the destruction of the transcripts of the grand jury testimony in the Shaw case, along with transcripts of numerous other closed cases. In 1990, Mr. Connick deposited some of the materials from the relevant period of time, which had previously been maintained by his office, with the N.O. Public Library. These records were deposited in the Library's Louisiana Archives.[2]

---

[1] In Louisiana, grand jury testimony is protected from public disclosure by a requirement of secrecy. La. Code of Criminal Procedure, Art 434. A court order rendered by a court of appropriate jurisdiction is necessary before any such information can be disseminated or disclosed. To disseminate or disclose information regarding grand jury proceedings in the absence of such a prior court order is constructive contempt of court. As a part of discharging his obligations to protect the secrecy of the grand jury, it is Mr. Connick's policy to periodically destroy transcripts of grand jury testimony in closed cases.

[2] In similar fashion, the City of Dallas maintains its own Archive of state and local records relating to the Assassination of President Kennedy.

In 1995, the Assassination Records Review Board conducted a hearing in the City of New Orleans. During the course of this hearing, heirs of Mr. Garrison's estate agreed to donate records in their possession relating to Mr. Garrison's investigation into the assassination of President Kennedy. Mr. Connick also appeared at that hearing. He described the records of the Garrison investigation still maintained in his office, and announced his intention to donate the remaining materials to the JFK Collection in the National Archives, notwithstanding the continued interest of the N.O. Public Library in including the materials in its Louisiana Archives.

Subsequently, Mr. Connick learned that his instructions to destroy grand jury transcripts from the Clay Shaw case had been disobeyed; that the materials had been removed without authority from his office by a former investigator;[3] and that these materials had been received by the Assassination Records Review Board. The ARRB refused to return these materials to the State of Louisiana, rejecting as immaterial Mr. Connick's assertions that the materials had been stolen from his office, and that no order of the Criminal District Court had been rendered permitting disclosure of said transcripts to the ARRB.[4] In view of the ARRB's participation, after the

---

[3] Gary Raymond, the former D.A. investigator, was convicted of constructive contempt by a judge of the Orleans Parish Criminal District Court in connection with his release of these grand jury transcripts. Mr. Raymond failed to seek a timely appeal of this conviction.

[4] Nor has the ARRB followed the directive contained in the "Act", regarding efforts to seek release of grand jury or other secret or sealed information held under seal of any court. Section 10(a). App. 42.

fact, in violation of the law of Louisiana, Mr. Connick reversed his decision to donate any materials owned by the State of Louisiana tc the ARRB for inclusion in the JFK Collection.

As a result, the ARRB requested the issuance of an administrative subpoena duces tecum directed to Mr. Connick and commanding the production of the documents in his possession relating to the assassination investigation conducted by Jim Garrison. Although the subpoena issued to Mr. Connick makes reference to the production of documents "for inspection and copying or reproduction", the ARRB does not want copies of the records. At the request of the ARRB, Mr. Connick has been ordered to surrender the original documents, which documents belong to the State of Louisiana and of which he is custodian by virtue of his public office. Mr. Connick has been ordered to accept in return copies of the documents, which copies are to be provided to him by the ARRB. Under the terms of the order of the district court, the ARRB is under no obligation whatsoever to return the original documents to the State of Louisiana, their rightful owner.

REASONS FOR GRANTING THE WRIT

I. The President John F. Kennedy Assassination Records Collection Act of 1992 was never intended by Congress to apply to Harry F. Connick, District Attorney in and for the Parish of Orleans, State of Louisiana, or to the local records of which he is custodian by virtue of his public office. The application of the terms of the "Act" to Mr. Connick by the U.S. Fifth Circuit erroneously decided important issues of federal law which should be settled and corrected by this Court.

A. Harry F. Connick does not hold "government office" as that term is defined at Sec. 3(5) of the President John F. Kennedy Assassination Records Collection Act of 1992, and Harry F. Connick is not therefore under any obligation to perform any of the acts required thereunder of "Government Offices".

In 1992, Congress addressed the problems of collecting, preserving, and disclosing to the public all of the federal records regarding the investigation into the assassination of John F. Kennedy and enacted the "President John F. Kennedy Assassination Records Collection Act of 1992" (hereinafter referred to as the "Act") (Pub.L. 102-526 §§ 1 to 14, Oct. 26, 1992, 106 Stat. 3443-3458, as amended Pub.L. 103-345, §§ 2 to 5a, Oct. 6, 1994, 108 Stat. 3128-3130, the text of which is found in the Historical and Statutory Notes to 44 U.S.C. 2107, and which is reprinted beginning at App. 13. The principal concern expressed by Congress was the public distrust and dissatisfaction engendered by the failure of the various branches and agencies of the federal government to disclose records relating to the various investigations into the assassination of President Kennedy.

As a result, Congress created the President John F. Kennedy Assassination Records Collection at the National Archives and Records Administration. *Ibid.* at Sec. 4(a), App. 18. The Collection is to consist of all "assassination records" transmitted to the Archives or required to be transmitted to the Archives under the Act. *Ibid.* at Sec. 4(a)(2)(A)(i) and (ii), App. 18. "Each Government office" was directed to identify all records relating to the assassination of President Kennedy and prepare them for transmission to the National Archives for inclusion in the Collection. *Ibid.* at Sec. 5(a), App. 20. Preparation for transmission included, among other things, a determination by "each government office" of which of its records were "assassination records" and whether disclosure of any of these "assassination records" should be postponed under standards set forth in the Act. *Ibid.* at Sec. 5(c), App. 21. Finally, "[e]ach government office" was ordered to transmit all assassination records to the National Archives in two categories – (1) all assassination records that could be publicly disclosed or had already been publicly disclosed on the date of the enactment of the "Act"; and (2) all assassination records which had been approved by the Assassination Records Review Board for postponement of disclosure under the standards of the "Act". *Ibid.*, Sec. 5(e), App. 24.

As a part of the Act, Congress defined a number of key terms as they are to be used and understood throughout the Act. Critical to the issue at hand is the definition of "government office." "Government office" was defined as –

> "any office of the **Federal** Government that has possession or control of assassination records . . . "

Ibid. at Sec. 3(5), App. 16.

Orleans Parish District Attorney Connick is not an officer of the federal government, but is rather an officer of the judicial branch of Louisiana state government. Therefore, he does not hold "Government office" within the meaning of the "Act". Because he does not hold "government office" within the meaning of the "Act", the "Act" does not oblige him to identify assassination records, prepare them for transmission to the National Archives, take any position regarding postponement of disclosure of said assassination records, or to actually transmit assassination records within his custody and control to the National Archives.

In finding that Mr. Connick "holds a government office within the intendment of the Act", the U.S. Fifth Circuit Court of Appeals relied not upon the provisions of the Act itself, but upon regulations issued by the Assassination Records Review Board. 36 C.F.R. Ch. XIV, Part 1400, §§ 1400.1-1400.8, App. 46-55. At 36 C.F.R. § 1400.7(a), the ARRB has redefined "[a] government agency, or office" to include –

> " . . . all current, past, and former departments, agencies, offices, divisons, foreign offices, bureaus, and deliberative bodies of any Federal, **state, or local government** . . . "

The ARRB has sought by adopting this regulation to expand its jurisdiction and authority to compel compliance with the terms of the "Act" by state and local

authorities whom Congress never contemplated would be so affected. As noted by the D.C. Circuit Court of Appeals in *Public Citizen v. Burke*, 843 F.2d 1473 (D.C. Cir. 1988), the question of whether or not a regulation's interpretation and application is consistent with the statute under which it was enacted is a question of law,

> "concerning which, as we have explained, we afford no deference to the government's position."

843 F.2d at p. 1480.

It is interesting to note, that *Public Citizen v. Burke, supra*, arose in the context of regulations enacted by the Archivist of the United States, the same official to whom "assassination records" are to be transmitted by all "government offices" under the JFK Assassination Records Collection Act. In that case, however, the Archivist was exercising the mandate imposed upon him by Congress to issue and submit substantive regulations regarding public disclosure of tape recordings and other materials collected by the Archivist, from former President Richard M. Nixon, pursuant to the "Presidential Recordings and Materials Preservation Act". "Presidential Recordings and Materials Preservation Act", Pub.L. 93-526, § 1, Title 1, §§ 101 to 106, Dec. 19, 1974, 88 Stat. 1695-1698, as amended Pub.L. 98-497, Title I, § 107(c), Oct. 19, 1984, 98 Stat. 2291.

In contrast, the Assassination Records Review Board was permitted by Congress in the JFK Assassination Records Collection Act to issue only "interpretive regulations". President John F. Kennedy Assassination Records

Collection Act of 1992, at Sec. 7(n), App. 33. The distinction between "substantive" and "interpretive" regulations is a significant one. "Legislative" or "substantive" regulations have been defined as those which "grant rights," "impose obligations," "produce other significant effects on private interests," or "have substantial legal effect". *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 908 (5th Cir. 1983). See also *U.S. Dept. of Labor v. Kast Metals Corp.*, 744 F.2d 1145 (5th Cir. 1984); *National Latino Medical Coalition v. F.C.C.*, 816 F.2d 785 (D.C. Cir. 1987); *Smith v. Russellville Production Credit Assn.*, 777 F.2d 1544 (11th Cir. 1985); and *U.S. v. Walter Dunlap & Sons, Inc.*, 800 F.2d 1232 (3rd Cir. 1986). By contrast, "interpretive regulations" merely interpret and explain the statute under which they are created. Without question, CFR § 1400.1(b)(2) and § 1400.2(a) attempt to confer rights upon the ARRB and to impose obligations upon the Appellant Harry F. Connick which cannot be found anywhere within the JFK Act itself. But the ARRB has no authority to promulgate regulations which purport to confer rights, impose obligations, expand the jurisdiction of the ARRB, or otherwise have any substantial legal effect. The ARRB has statutory authority only to issue interpretive regulations which, by definition, can have no binding effect. These regulations may not serve as the basis for any decision ordering Mr. Connick to comply with the provisions of the "Act", which provisions upon their face have no application to him.

Yet, notwithstanding that the facial inconsistencies between the statute and the regulation are clear even upon casual comparison, the Fifth Circuit did not attempt

to examine whether or not 36 C.F.R. § 1400.7(a) is consistent with the "Act" , and ruled that Mr. Connick did hold government office based solely upon C.F.R. § 1400.7(a). This decision was erroneous and should be corrected by this Court.

B. The documents under Mr. Connick's custody and control as District Attorney in and for the Parish of Orleans, State of Louisiana, are not "assassination records" within the meaning of the President John F. Kennedy Assassination Records Collection Act, and Mr. Connick may not therefore be compelled to transmit said documents to the Archivist.

At Sec. 3(2) of the "Act", App. 15, an "assassination record" is specifically defined as a record related to the assassination of President Kennedy "that was created or made available for use by, obtained by, or otherwise came into the possession of –" a number of named entities, at subsections (A) through (K), including the Warren Commission, the Rockefeller Commission, and the House Assassinations Committee. Finally at subsection (L), an "assassination record" may also be a document created or in the possession of

> (L) any State or local law enforcement office that provided support or assistance or performed work **in connection with a Federal inquiry** into the assassination of President John F. Kennedy . . . "

Ibid. (Emphasis added.)

The records, of which Harry F. Connick is custodian, are not "assassination records" within the meaning of the

"Act", since they were created in connection with a state criminal prosecution conducted by a local district attorney and had no connection whatsoever with any federal inquiry into the assassination of President Kennedy.

In finding that documents in the possession of Mr. Connick are "assassination records" within the intendment of the "Act", the Fifth Circuit Court of Appeals ignored the language of the Act regarding documents created or in the possession of state or local authorities, language which clearly excludes the records possessed by Mr. Connick, and focused instead upon Sec. 3(2)(E) regarding records "created or made available for use by, obtained by, or otherwise came into the possession of – (E) the Select Committee on Assassination (the 'House Assassinations Committee') of the House of Represenatatives".

The Fifth Circuit Court of Appeals makes reference to an event which took place sometime in 1978, when representatives of the House Assassinations Committee reviewed documents relating to the prosecution of Clay Shaw. This review took place at the District Attorney's Office in New Orleans, Louisiana. The House representatives were given the same access to these documents to which any member of the public at large is entitled under the Louisiana Public Records Law. LSA-R.S. 44:1. The House representatives selected only 12 of the myriad documents for copying, dismissing the balance of the records as not relevant to the House investigation. Only these 12 documents returned to Washington with the House representatives and were made a part of and utilized in connection with the then ongoing House investigation into the assassination of President Kennedy. While

petitioner would concede that these 12 documents "were made available for use" by the House Assassinations Committee, it is presumed that these documents have already been made a part of the Collection through transmission by the House Assassinations Committee. The assertion that all of the documents relating to the Shaw prosecution "were made available for use" by the Committee, simply by permitting representatives of the Committee to review the records and search for relevant documents, is an erroneous legal conclusion which should be corrected by this Court.

II. The departure from ordinary subpoena practice sanctioned by the decision of the U.S. Fifth Circuit Court of Appeals requires the exercise of this Court's supervisory power.

A. The subpoena power afforded to the ARRB by the Act extends only so far as is necessary to perform its responsibility to review decisions of "government offices" to postpone disclosure of "assassination records". The subpoena issued herein in the absence of any dispute as to the nature and location of the documents in question and in the absence of any decision to postpone disclosure exceeds the authority to request issuance of a subpoena afforded to the ARRB by Congress.

The President John F. Kennedy Assassination Records Collection Act created the Assassination Records Review Board, an independent agency to facilitate the accomplishment of the purposes of the Act. The ARRB is given a singular responsibility under the Act –

> "The Review Board shall consider and render decisions on a determination by a Government

> office to seek to postpone the disclosure of assasssination records."

The "Act" at Sec. 7(i)(1), App. 31. In carrying out this responsibility, and only in connection with carrying out this responsibility to review the determinations of federal agencies, the ARRB is authorized to make determinations regarding whether specific records constitute "assassination records" within the meaning of the Act, and whether or not any given "assassination record" qualifies for postponement of disclosure under the Act. *Ibid.* at Sec. 7(i)(2), App. 31-32. The authority of the ARRB to request the issuance of a subpoena in connection with its responsibility to review decisions by Government offices is set out at Sec. 7(j)(C)(iii), App. 32. The Review board has the authority to:

> " . . . request the Attorney General to subpoena private persons to compel testimony, records, and other information relevant to its responsibilities under this Act;"

Ibid. This authority does not exceed the extent to which such a subpoena would be necessary in order for the Board to fulfill its responsibilities under the Act, as set forth at § 7(i)(1) and (2).

As has been previously discussed, there exists no dispute as to the nature of the records in Mr. Connick's possession. All of said documents relate to a local investigation into the assassination of President Kennedy. These records are the property of the State of Louisiana, and the disposition of said property is not only expressly excluded from the provisions of the JFK Act, but is as well a legitimate exercise of the police powers of the State of Louisiana. *Board of Levee Commissioners of the Orleans*

Levee Board v. Huls, Civil Action No. 84-3901, 1987 USDC Lexis 8561 (E.D. La. 1987), citing *Richardson & Bass v. Board of Levee Commissioners of the Orleans Levee District*, 231 La. 299, 91 So.2d 353 (La. 1956).

Furthermore, Mr. Connick has made no "determination . . . to postpone disclosure" of any record which would require review by the Board, as is contemplated by § 7(i)(1). The records of closed investigations maintained by the Office of the District Attorney in and for the Parish of Orleans are public records as defined by the La. Public Records Law, LSA R.S. 44:1 et seq. As such, they are open for public inspection and copying upon request. In fact, representatives of the ARRB have been afforded access to the records in question. There is therefore, no determination regarding postponement for the ARRB to review.

Inasmuch as the ARRB has no authority under the statute to conduct any investigation into dispositions made by Mr. Connick of records of state or local investigations into the assassination of President Kennedy, and inasmuch as Connick has made no decision to postpone disclosure of the records, it follows that the ARRB has no authority to request enforcement of a subpoena purportedly issued in aid of such an unauthorized investigation. See for example, *Burlington Northern Railroad Co. v. Office of Inspector General, Railroad Retirement Board*, 983 F.2d 631 (5th Cir. 1993); and *Federal Trade Commission v. Turner*, 609 F.2d 743 (5th Cir. 1980).

B. Ordinary subpoena practice requires only production of documents for inspection and copying. The order of the district court affirmed by the U.S. Fifth Circuit Court of Appeals requires Mr. Connick to release the original documents in his possession to the ARRB. The ARRB is only required to return to Mr. Connick photocopies. The subpoena power has in this instance been used as a thinly veiled vehicle to seize and expropriate property belonging to the State of Louisiana.

As should be clear, the ARRB is not in reality engaged in any investigation. There remain no facts to uncover through the use of discovery tools. The subpoena issued upon its request is not in aid of the fulfillment of its responsibilities to oversee the determinations of the various federal agencies regarding the identification and disclosure of the records of federal investigations into the assassination of President Kennedy.

The subpoena itself which was issued to Mr. Connick at the request of the ARRB requires only that Mr. Connick "produce and make available for inspection and copying or reproduction" the documents described at Exhibit "A" to the subpoena. App. 5. In similar fashion, under Rule 45(a)(C) of the Federal Rules of Civil Procedure a person may be required

> "to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person . . . "

Notwithstanding, the ARRB has refused to accept photocopies of the documents in Mr. Connick's possession.

Instead, the ARRB sought and received an order requiring Mr. Connick to release the original documents in his possession, and obligated the ARRB only to return photocopies or reproductions.

By refusing to accept photocopies, as would be consistent with the subpoena itself and with ordinary subpoena practice, and by obtaining instead an order requiring Mr. Connick to release the originals of the documents in his custody, the ARRB is obviously attempting to use the subpoena as a vehicle to seize property belonging to the State of Louisiana and to divest the State of Louisiana of its possessory and ownership interests and rights in and to said property. This purpose is nowhere expressly authorized by the "Act".

In enacting the Presidential Recordings and Materials Preservation Act of 1974, in response to concerns that certain recordings and other materials made by and/or created in the Nixon White House might be destroyed if forwarded to or released to Mr. Nixon, Congress had no difficulty expressing its intention that the Archivist be authorized to expropriate property, even providing that just compensation be paid to any person held to have been deprived of private property by the provisions of PRMPA. PRMPA § 105(c) and *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992), recognizing Mr. Nixon's right to compensation and remanding to district court for a determination as to the amount.

In contrast, the JFK Assassination Records Collection Act contains no provisions regarding expropriation of property or regarding compensation therefor. The Act

would appear to assume that in fulfillment of its responsibilities, the ARRB would be collecting and supervising the disclosure of documents already owned by the federal government through its various branches, commissions, agencies and offices.

Nor has the ARRB pointed to anything contained within the Legislative History of the Act which would support the conclusion that Congress intended to authorize the ARRB to seize, confiscate, or expropriate property of either private citizens or of any sovereign state of this Union, but failed to do so expressly.

Nor is it easy to imagine the reason why such a provision would have been considered necessary to achieve the stated purposes of the "Act". At Section 2 of the "Act", appearing at App. 13-14, the U.S. Congress set forth its findings regarding and declarations of need for the legislation which follows. The principal concern of Congress in 1992 was the need for public disclosure of all records related to the federal investigations into the assassination of President Kennedy, and the failure of public trust in the agencies of the federal government which refused to disclose such information. Not only are the subpoenaed documents unrelated to any federal investigation into the assassination of President Kennedy, but they have been a matter of public record by virtue of state law since long before the JFK Act was passed in 1992. Had all federal agencies been subject to the provisions of the La. Public Records Law, there would have been no need whatsoever for the JFK Act.

Even if the records of former New Orleans District Attorney Garrison's investigation into the Kennedy assassination should be included in the National Archives for the sake of completeness, the ARRB has never been required to show a "need" to take from the State of Louisiana its original documents. Under the provisions of the La. Public Records Law, representatives of the ARRB may order copies of any of these records. Under ordinary subpoena practice, the ARRB would receive copies of the documents. The regulations of the ARRB itself make clear that photocopies and/or other types of reproductions may be accepted into the Collection in lieu of originals. 36 C.F.R. § 1400.6, App. 50-52. No justification has been offered for divesting the State of Louisiana of possession of its original records, particularly when photocopies are readily available, and when the ARRB has itself approved the inclusion of copies or reproductions of documents in the Collection. The U.S. Fifth Circuit Court of Appeals has, in affirming the order of the district court, so far departed from usual and ordinary practice as to justify the exercise of this Court's supervisory powers.

CONCLUSION

This case presents important questions concerning the interpretation and application of the President John F. Kennedy Assassination Records Collection Act, questions which have never been heretofore addressed. Further, this case raises important issues relating to the complex relationship between the federal government, its various agencies and boards, on one hand, and the government of the State of Louisiana, on the other hand, a[illegible] issues of

importance which deserve to be addressed by this Court. Finally, this case involves a departure from normal subpoena practice so egregious as to require correction by this Court.

For all of these reasons and for all of the reasons more completely addressed in this Petition, petitioners pray that the writ sought herein be granted.

Respectfully submitted,

WESSEL & ASSOCIATES
WILLIAM F. WESSEL
Counsel of Record
CHARLOTTE A. LAGARDE
127 Camp Street
New Orleans, LA 70130
(504) 568-1112
(504) 568-1208 (Fax)

and

VICTORIA LENNOX BARTELS
127 Camp Street
New Orleans, Louisiana 70130
(504) 568-1112
(504) 568-1208 (Fax)

Attorneys for Petitioner
Harry F. Connick

In re Assassination Records Review Board Subpoena to Harry F. CONNICK.

Harry F. CONNICK, Assassination Records Review Board Subpoena, Petitioner-Appellant,

v.

UNITED STATES of America, on Behalf of the ASSASSINATION RECORDS REVIEW BOARD, Movant-Appellee.

In re Assassination Records Review Board Subpoena to Harry F. CONNICK.

UNITED STATES of America, Petitioner-Appellee,

v.

Harry F. CONNICK, District Attorney of the Parish of Orleans, Respondent-Appellant.

No. 96-30708.

United States Court of Appeals,
Fifth Circuit

Oct. 10, 1997.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before POLITZ, Chief Judge, and HIGGINBOTHAM and SMITH, Circuit Judges.

POLITZ, Chief Judge:

In the late 1960s Orleans Parish District Attorney Jim Garrison prosecuted New Orleans businessman Clay Shaw for violations of Louisiana state law in connection with his alleged participation in a conspiracy to assassinate President John F. Kennedy. The records of that fruitless and now infamous prosecution are contained in a file

cabinet in New Orleans, Louisiana; current Orleans Parish District Attorney Harry F. Connick is the custodian of those records.

The President John F. Kennedy Assassination Records Review Board held a hearing in 1995 to evaluate the relevancy of the Shaw records. Connick appeared at the hearing and confirmed the existence and content of the records. The Board thereafter requested that Connick transfer the records to the President John F. Kennedy Assassination Records Collection at the National Archives. Connick refused to do so.

After learning of the refusal, the Board secured a subpoena duces tecum directing Connick to surrender the records. Connick filed a Motion to Quash the subpoena, and the Board filed a Petition for Summary Enforcement. Following a hearing, the district court ordered Connick to surrender the records to the Board. Connick timely appealed the order and judgment contending that the Board lacks authority to compel the surrender of the Shaw records.

Congress enacted the President John F. Kennedy Assassination Records Collection Act to ensure that all records relating to the assassination of President Kennedy are preserved for and disclosed to the general public. To achieve this patently meritorious goal, the Act authorizes the Board to "direct Government offices to transmit to the [National Archives] assassination records."[1] The Act

---

[1] President John F. Kennedy Assassination Records Collection Act of 1992, Pub.L. No. 102-526, § 7(j)(1)(B), 106 Stat. 3443, 3452 (1992).

defines an assassination record as any record related to the assassination of President Kennedy and "made available for use by . . . the Select Committee on Assassinations . . . of the House of Representatives."[2] The Shaw records indisputably are related to the assassination of President Kennedy. Further, a representative of the Select Committee on Assassinations traveled to New Orleans in 1978 and, with the consent of Connick, inspected, indexed, and photocopied portions of those records. As a result, the Shaw records are assassination records within the meaning and intendment of the Act.

Connick holds a government office within the intendment of the Act. Exercising its statutory authority,[3] the Board issued regulations defining "government office" as including "all . . . departments, agencies, offices, [or] divisions . . . of any . . . state, or local . . . government."[4] Under this regulation the Orleans Parish District Attorney occupies a government office covered by the Act and is obligated to transfer all assassination records in his possession to the National Archives.

---

[2] *Id.* § 3(2)(E), 106 Stat. 3444.

[3] *Id.* § 7(n), 106 Stat. 3452. The Act authorizes the Board to issue interpretive regulations. Interpretive regulations are valid if they "harmonize . . . with the plain language of the statute, its origin, and its purpose." *See Rowan Cos. v. United States*, 452 U.S. 247, 253, 101 S.Ct. 2288, 2292, 68 L.Ed.2d 814 (1981). The regulations issued by the Board enable it to assimilate and preserve *all* assassination records – whether they be in the hands of the federal government, a state government, or a private citizen. These regulations are clearly in line with the stated purpose and express language of the Act and are, therefore, valid.

[4] 36 C.F.R. § 1400.7 (1996).

The judgment and order upholding and enforcing the subpoena duces tecum issued to District Attorney Harry F. Connick is AFFIRMED.

[SEAL]

Civil Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

EXHIBIT A

SUBPOENA DUCES TECUM
FOR THE PRODUCTION OF DOCUMENTS
AND APPEARANCE FOR TESTIMONY
BEFORE THE ASSASSINATION
RECORDS REVIEW BOARD

TO: Harry Connick, District Attorney
Parish of New Orleans
619 South White Street
New Orleans, Louisiana 70119

YOU ARE HEREBY REQUIRED AND DIRECTED, PURSUANT TO 44 U.S.C. § 2107, TO APPEAR BEFORE:

T. Jeremy Gunn, General Counsel of the Assassination Records Review Board at 600 E Street, N.W., Second Floor in the City of Washington, D.C. on the 16th day of February, 1996 at 10:00 a.m., or at such other mutually agreeable time and place, to testify under oath regarding: any records relating to the assassination of President John F. Kennedy, including, but not limited to, any records relating to the investigation and prosecution of Mr. Clay Shaw by the former New Orleans District Attorney, Jim Garrison.

YOU ARE HEREBY REQUIRED to bring with you, to produce and to make available for inspection and copying or reproduction at said time and place all books,

records, correspondence, electronic recordings, photographs, motion pictures and documents that are in your possession, custody, or control and which are described in Exhibit A attached hereto in accordance with the attached definitions and instructions.

The production of documentary material in response to this subpoena must be made under a sworn certificate, in the form set forth, by the person to whom this subpoena is directed or, if not a natural person, by a person or persons having knowledge of the facts and circumstances relating to such production.

Inquiries concerning compliance with this subpoena should be directed to: T. Jeremy Gunn, General Counsel of the Assassination Records Review Board, 600 E Street, N.W., Washington, D.C., 20530, (202) 724-0088; (FAX) (202) 724-0457.

ISSUED AT Washington, D.C.

THIS 29 DAY OF January, 1996

By: /s/ Frank W. Munger
FRANK W. MUNGER
Assistant Attorney General

EXHIBIT A

YOU ARE HEREBY REQUIRED to produce all documents and records in your possession, custody or control relating to the assassination of President John F. Kennedy, including, but not limited to handwritten notes, memoranda, drawings, photographs, tape recordings, and correspondence that relate to the investigation and prosecution of Mr. Clay Shaw by former New Orleans District Attorney, Jim Garrison, with the exception of any grand jury materials still extant in the possession of the District Attorney's Office.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

IN RE:	)	Misc.
Assassination Records Review Board Subpoena to Harry F. Connick	)	Civil Action No. 96-0598
	)	c/w No. 96-824
	)	Section "E"
	)	Magistrate 4
	)	(Filed June 25, 1996)

ORDER AND JUDGMENT OF THE COURT

This matter, having been initiated with the filing of a Motion to Quash Subpoena by Harry F. Connick ("Respondent"), and having been subsequently consolidated with a Petition for Summary Enforcement of Administrative Subpoena Duces Tecum and for Enforcement or Order of February 16, 1996, by the United States, on behalf of the Assassination Records Review Board ("Petitioner"); the Court having considered the briefs of both parties, and having heard oral argument in open court on the 12th day of June, 1996, it is by this Court:

ORDERED as provided below, that Respondent's Motion to Quash is granted in part, and denied in part; and it is

FURTHER ORDERED as provided below, that Petitioner's Petition for Summary Enforcement of Administrative Subpoena Duces Tecum and for Enforcement of Order of February 16, 1996, is granted in part, and denied in part; and it is

FURTHER ORDERED, that this Court's Order of February 16, 1996, staying enforcement of the Administrative Subpoena Duces Tecum be, and it hereby is, VACATED; and it is

FURTHER ORDERED that the Petition for Summary Enforcement of Administrative Subpoena Duces Tecum and for Enforcement of Order of February 16, 1996 shall be, and it hereby is granted to the following extent:

As soon as practicable, Respondent shall turn over to the Petitioner the originals of all records in his possession that are described in the Administrative Subpoena dated January 29, 1996, served upon Respondent on or about February 5, 1996; PROVIDED, HOWEVER, that Petitioner shall make clear and legible copies of each record, including but not limited to all paper records and all audiotapes or other forms of audio recordings, and provide such copies to Respondent. In complying with this Order, Petitioner may exercise its judgment and discretion as to the type and location of facilities that are best suited to make clear and legible copies of all such records; and it is

FURTHER ORDERED, that this Court shall maintain jurisdiction over compliance with the subpoena duces tecum until notified by the Petition that full compliance therewith has been obtained.

SO ORDERED, this 25 day of June, 1996.

/s/ Marcel Livaudais, Jr.
MARCEL LIVAUDAIS, JR.
UNITED STATES
DISTRICT JUDGE

SUBMITTED BY:

/s/ Arthur R. Goldberg
Arthur R. Goldberg
Attorney for Petitioner

APPROVED AS TO FORM:

/s/ William F. Wessel
William F. Wessel
Attorney for Respondent

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE:	*	CIVIL ACTION
	*	
ASSASSINATION	*	NO. 96-0598
RECORDS REVIEW	*	c/w NO. 96-824
BOARD SUBPOENA TO	*	SECTION "E"
HARRY F. CONNICK	*	MAGISTRATE 4
	*	(Filed July 3, 1996)

****

NOTICE OF APPEAL

Notice is hereby given that Harry F. Connick, respondent in the above named case, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment and order entered in this action on the 26th day of June, 1996.

Respectfully submitted,

WESSEL & ASSOCIATES
A LAW CORPORATION

/s/ William Wessel
William F. Wessel (#8551)
Charlotte A. Lagarde (#20257)
127 Camp Street
New Orleans, Louisiana 70130
(504) 568-1112
Attorneys for Harry F. Connick

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for all parties by mailing the same to each, properly addressed and postage prepaid, this 3rd day of July, 1996.

/s/ Charlotte Lagarde

PUBLIC LAW 102-526 [S. 3006]; October 26, 1992

PRESIDENT JOHN F. KENNEDY ASSASSINATION RECORDS COLLECTION ACT OF 1992

For Legislative History of Act, see p. 2965.

An Act to provide for the expeditious disclosure of records relevant to the assassination of President John F. Kennedy.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "President John F. Kennedy Assassination Records Collection Act of 1992".

SEC. 2. FINDINGS, DECLARATIONS, AND PURPOSES.

(a) FINDINGS AND DECLARATIONS. – The Congress finds and declares that –

(1) all Government records related to the assassination of President John F. Kennedy should be preserved for historical and governmental purposes;

(2) all Government records concerning the assassination of President John F. Kennedy should carry a presumption of immediate disclosure, and all records should be eventually disclosed to enable the public to become fully informed about the history surrounding the assassination;

(3) legislation is necessary to create an enforceable, independent, and accountable process for the public disclosure of such records;

(4) legislation is necessary because congressional records related to the assassination of President John F. Kennedy would not otherwise be subject to public disclosure until at least the year 2029;

(5) legislation is necessary because the Freedom of Information Act, as implemented by the executive branch, has prevented the timely public disclosure of records relating to the assassination of President John F. Kennedy;

(6) legislation is necessary because Executive Order No. 12356, entitled "National Security Information" has eliminated the declassification and downgrading schedules relating to classified information across government and has prevented the timely public disclosure of records relating to the assassination of President John F. Kennedy; and

(7) most of the records related to the assassination of President John F. Kennedy are almost 30 years old, and only in the rarest cases is there any legitimate need for continued protection of such records.

(b) PURPOSES. – The purposes of this Act are –

(1) to provide for the creation of the President John F. Kennedy Assassination Records Collection at the National Archives and Records Administration; and

(2) to require the expeditious public transmission to the Archivist and public disclosure of such records.

SEC. 3. DEFINITIONS.

In this Act:

(1) "Archivist" means the Archivist of the United States.

(2) "Assassination record" means a record that is related to the assassination of President John F. Kennedy, that was created or made available for use by, obtained by, or otherwise came into the possession of –

(A) the Commission to Investigate the Assassination of President John F. Kennedy (the "Warren Commission");

(B) the Commission on Central Intelligence Agency Activities Within the United States (the "Rockefeller Commission");

(C) the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the "Church Committee");

(D) the Select Committee on Intelligence (the "Pike Committee") of the House of Representatives;

(E) the Select Committee on Assassinations (the "House Assassinations Committee") of the House of Representatives;

(F) the Library of Congress;

(G) the National Archives and Records Administration;

(H) any Presidential library;

(I) any Executive agency;

(J) any independent agency;

(K) any other office of the Federal Government; and

(L) any State or local law enforcement office that provided support or assistance or performed work in connection with a Federal

inquiry into the assassination of President John F. Kennedy,

but does not include the autopsy records donated by the Kennedy family to the National Archives pursuant to a deed of gift regulating access to those records, or copies and reproductions made from such records.

(3) "Collection" means the President John F. Kennedy Assassination Records Collection established under section 4.

(4) "Executive agency" means an Executive agency as defined in subsection 552(f) of title 5, United States Code, and includes any Executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government, including the Executive Office of the President; or any independent regulatory agency.

(5) "Government office" means any office of the Federal Government that has possession or control of assassination records, including –

(A) the House Committee on Administration with regard to the Select Committee on Assassinations of the records of the House of Representatives;

(B) the Select Committee on Intelligence of the Senate with regard to records of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities and other assassination records;

(C) the Library of Congress;

(D) the National Archives as custodian of assassination records that it has obtained or possesses, including the Commission to Investigate

the Assassination of President John F. Kennedy and the Commission on Central Intelligence Agency Activities in the United States; and

(E) any other executive branch office or agency, and any independent agency.

(6) "Identification aid" means the written description prepared for each record as required in section 4.

(7) "National Archives" means the National Archives and Records Administration and all components thereof, including Presidential archival depositories established under section 2112 of title 44, United States Code.

(8) "Official investigation" means the reviews of the assassination of President John F. Kennedy conducted by any Presidential commission, any authorized congressional committee, and any Government agency either independently, at the request of any Presidential commission, or congressional committee, or at the request of any Government official.

(9) "Originating body" means the Executive agency, government commission, congressional committee, or other governmental entity that created a record or particular information within a record.

(10) "Public interest" means the compelling interest in the prompt public disclosure of assassination records for historical and governmental purposes and for the purpose of fully informing the American people about the history surrounding the assassination of President John F. Kennedy.

(11) "Record" includes a book, paper, map, photograph, sound or video recording, machine readable material, computerized, digitized, or electronic

information, regardless of the medium on which it is stored, or other documentary material, regardless of its physical form or characteristics.

(12) "Review Board" means the Assassination Records Review Board established by section 7.

(13) "Third agency" means a Government agency that originated an assassination record that is in the possession of another agency.

SEC. 4. PRESIDENT JOHN F. KENNEDY ASSASSINATION RECORDS COLLECTION AT THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

(a) IN GENERAL. – (1) Not later than 60 days after the date of enactment of this Act, the National Archives and Records Administration shall commence establishment of a collection of records to be known as the President John F. Kennedy Assassination Records Collection. In so doing, the Archivist shall ensure the physical integrity and original provenance of all records. The Collection shall consist of record copies of all Government records relating to the assassination of President John F. Kennedy, which shall be transmitted to the National Archives in accordance with section 2107 of title 44, United States Code. The Archivist shall prepare and publish a subject guidebook and index to the collection.

(2) The Collection shall include –

(A) all assassination records –

(i) that have been transmitted to the National Archives or disclosed to the public in an unredacted form prior to the date of enactment of this Act;

(ii) that are required to be transmitted to the National Archives; or

(iii) the disclosure of which is postponed under this Act;

(B) a central directory comprised of identification aids created for each record transmitted to the Archivist under section 5; and

(C) all Review Board records as required by this Act.

(b) DISCLOSURE OF RECORDS. – All assassination records transmitted to the National Archives for disclosure to the public shall be included in the Collection and shall be available to the public for inspection and copying at the National Archives within 30 days after their transmission to the National Archives.

(c) FEES FOR COPYING. – The Archivist shall –

(1) charge fees for copying assassination records; and

(2) grant waivers of such fees pursuant to the standards established by section 552(a)(4) of title 5, United States Code.

(d) ADDITIONAL REQUIREMENTS. – (1) The Collection shall be preserved, protected, archived, and made available to the public at the National Archives using appropriations authorized, specified, and restricted for use under the terms of this Act.

(2) The National Archives, in consultation with the Information Security Oversight Office, shall ensure the security of the postponed assassination records in the Collection.

(e) OVERSIGHT. – The Committee on Government Operations of the House of Representatives and the Committee on Governmental Affairs of the Senate shall have continuing oversight jurisdiction with respect to the Collection.

SEC. 5. REVIEW, IDENTIFICATION, TRANSMISSION TO THE NATIONAL ARCHIVES, AND PUBLIC DISCLOSURE OF ASSASSINATION RECORDS BY GOVERNMENT OFFICES.

(a) IN GENERAL. – (1) As soon as practicable after the date of enactment of this Act, each Government office shall identify and organize its records relating to the assassination of President John F. Kennedy and prepare them for transmission to the Archivist for inclusion in the Collection.

(2) No assassination record shall be destroyed, altered, or mutilated in any way.

(3) No assassination record made available or disclosed to the public prior to the date of enactment of this Act may be withheld, redacted, postponed for public disclosure, or reclassified.

(4) No assassination record created by a person or entity outside government (excluding names or identities consistent with the requirements of section 6) shall be withheld, redacted, postponed for public disclosure, or reclassified.

(b) CUSTODY OF ASSASSINATION RECORDS PENDING REVIEW. – During the review by Government offices and pending review activity by the Review Board, each Government office shall retain custody of its assassination

records for purposes of preservation, security, and efficiency, unless –

(1) the Review Board requires the physical transfer of records for purposes of conducting an independent and impartial review;

(2) transfer is necessary for an administrative hearing or other Review Board function; or

(3) it is a third agency record described in subsection (c)(2)(C).

(c) REVIEW. – (1) Not later than 300 days after the date of enactment of this Act, each Government office shall review, identify and organize each assassination record in its custody or possession for disclosure to the public, review by the Review Board, and transmission to the Archivist.

(2) In carrying out paragraph (1), a Government office shall –

(A) determine which of its records are assassination records;

(B) determine which of its assassination records have been officially disclosed or publicly available in a complete and unredacted form;

(C)(i) determine which of its assassination records, or particular information contained in such a record, was created by a third agency or by another Government office; and

(ii) transmit to a third agency or other Government office those records, or particular information contained in those records, or complete and accurate copies thereof;

(D)(i) determine whether its assassination records or particular information in assassination records are covered by the standards for postponement of public disclosure under this Act; and

(ii) specify on the identification aid required by subsection (d) the applicable postponement provision contained in section 6;

(E) organize and make available to the Review Board all assassination records identified under subparagraph (D) the public disclosure of which in whole or in part may be postponed under this Act;

(F) organize and make available to the Review Board any record concerning which the office has any uncertainty as to whether the record is an assassination record governed by this Act;

(G) give priority to –

(i) the identification, review, and transmission of all assassination records publicly available or disclosed as of the date of enactment of this Act in a redacted or edited form; and

(ii) the identification, review, and transmission, under the standards for postponement set forth in this Act, of assassination records that on the date of enactment of this Act are the subject of litigation under section 552 of title 5, United States Code; and

(H) make available to the Review Board any additional information and records that the Review Board has reason to believe it requires for conducting a review under this Act.

(3) The Director of each archival depository established under section 2112 of title 44, United States Code, shall have as a priority the expedited review for public

disclosure of assassination records in the possession and custody of the depository, and shall make such records available to the Review Board as required by this Act.

(d) IDENTIFICATION AIDS. – (1)(A) Not later than 45 days after the date of enactment of this Act, the Archivist, in consultation with the appropriate Government offices, shall prepare and make available to all Government offices a standard form of identification or finding aid for use with each assassination record subject to review under this Act.

(B) The Archivist shall ensure that the identification aid program is established in such a manner as to result in the creation of a uniform system of electronic records by Government offices that are compatible with each other.

(2) Upon completion of an identification aid, a Government office shall –

(A) attach a printed copy to the record it describes;

(B) transmit to the Review Board a printed copy; and

(C) attach a printed copy to each assassination record it describes when it is transmitted to the Archivist.

(3) Assassination records which are in the possession of the National Archives on the date of enactment of this Act, and which have been publicly available in their entirety without redaction, shall be made available in the Collection without any additional review by the Review Board or another authorized office under this Act, and

shall not be required to have such an identification aid unless required by the Archivist.

(e) TRANSMISSION TO THE NATIONAL ARCHIVES. – Each Government office shall –

(1) transmit to the Archivist, and make immediately available to the public, all assassination records that can be publicly disclosed, including those that are publicly available on the date of enactment of this Act, without any redaction, adjustment, or withholding under the standards of this Act; and

(2) transmit to the Archivist upon approval for postponement by the Review Board or upon completion of other action authorized by this Act, all assassination records the public disclosure of which has been postponed, in whole or in part, under the standards of this Act, to become part of the protected Collection.

(f) CUSTODY OF POSTPONED ASSASSINATION RECORDS. – An assassination record the public disclosure of which has been postponed shall, pending transmission to the Archivist, be held for reasons of security and preservation by the originating body until such time as the information security program has been established at the National Archives as required in section 4(e)(2).

(g) PERIODIC REVIEW OF POSTPONED ASSASSINATION RECORDS. – (1) All postponed or redacted records shall be reviewed periodically by the originating agency and the Archivist consistent with the recommendations of the Review Board under section 9(c)(3)(B).

(2)(A) A periodic review shall address the public disclosure of additional assassination records in the Collection under the standards of this Act.

(B) All postponed assassination records determined to require continued postponement shall require an unclassified written description of the reason for such continued postponement. Such description shall be provided to the Archivist and published in the Federal Register upon determination.

(C) The periodic review of postponed assassination records shall serve to downgrade and declassify security classified information.

(D) Each assassination record shall be publicly disclosed in full, and available in the Collection no later than the date that is 25 years after the date of enactment of this Act, unless the President certifies, as required by this Act, that –

(i) continued postponement is made necessary by an identifiable harm to the military defense, intelligence operations, law enforcement, or conduct of foreign relations; and

(ii) the identifiable harm is of such gravity that it outweighs the public interest in disclosure.

(h) FEES FOR COPYING. – Executive branch agencies shall –

(1) charge fees for copying assassination records; and

(2) grant waivers of such fees pursuant to the standards established by section 552(a)(4) of title 5, United States Code.

SEC. 6. GROUNDS FOR POSTPONEMENT OF PUBLIC DISCLOSURE OF RECORDS.

Disclosure of assassination records or particular information in assassination records to the public may be postponed subject to the limitations of this Act if there is clear and convincing evidence that –

(1) the threat to the military defense, intelligence operations, or conduct of foreign relations of the United States posed by the public disclosure of the assassination is of such gravity that it outweighs the public interest, and such public disclosure would reveal –

(A) an intelligence agent whose identity currently requires protection;

(B) an intelligence source or method which is currently utilized, or reasonably expected to be utilized, by the United States Government and which has not been officially disclosed, the disclosure of which would interfere with the conduct of intelligence activities; or

(C) any other matter currently relating to the military defense, intelligence operations or conduct of foreign relations of the United States, the disclosure of which would demonstrably impair the national security of the United States;

(2) the public disclosure of the assassination record would reveal the name or identity of a living person who provided confidential information to the United States and would pose a substantial risk of harm to that person;

(3) the public disclosure of the assassination record could reasonably be expected to constitute an unwarranted invasion of personal privacy, and that

invasion of privacy is so substantial that it outweighs the public interest;

(4) the public disclosure of the assassination record would compromise the existence of an understanding of confidentiality currently requiring protection between a Government agent and a cooperating individual or a foreign government, and public disclosure would be so harmful that it outweighs the public interest; or

(5) the public disclosure of the assassination record would reveal a security or protective procedure currently utilized, or reasonably expected to be utilized, by the Secret Service or another Government agency responsible for protecting Government officials, and public disclosure would be so harmful that it outweighs the public interest.

SEC. 7. ESTABLISHMENT AND POWERS OF THE ASSASSINATION RECORDS REVIEW BOARD.

(a) ESTABLISHMENT. – There is established as an independent agency a board to be known as the Assassination Records Review Board.

(b) APPOINTMENT. – (1) The President, by and with the advice and consent of the Senate, shall appoint, without regard to political affiliation, 5 citizens to serve as members of the Review Board to ensure and facilitate the review, transmission to the Archivist, and public disclosure of Government records related to the assassination of President John F. Kennedy.

(2) The President shall make nominations to the Review Board not later than 90 calendar days after the date of enactment of this Act.

(3) If the Senate votes not to confirm a nomination to the Review Board, the President shall make an additional nomination not later than 30 days thereafter.

(4)(A) The President shall make nominations to the Review Board after considering persons recommended by the American Historical Association, the Organization of American Historians, the Society of American Archivists, and the American Bar Association.

(B) If an organization described in subparagraph (A) does not recommend at least 2 nominees meeting the qualifications stated in paragraph (5) by the date that is 45 days after the date of enactment of this Act, the President shall consider for nomination the persons recommended by the other organizations described in subparagraph (A).

(C) The President may request an organization described in subparagraph (A) to submit additional nominations.

(5) Persons nominated to the Review Board –

(A) shall be impartial private citizens, none of whom is presently employed by any branch of the Government, and none of whom shall have had any previous involvement with any official investigation or inquiry conducted by a Federal, State, or local government, relating to the assassination of President John F. Kennedy;

(B) shall be distinguished persons of high national professional reputation in their respective fields who are capable of exercising the independent and objective judgment necessary to the fulfillment of their role in ensuring and

facilitating the review, transmission to the public, and public disclosure of records related to the assassination of President John F. Kennedy and who possess an appreciation of the value of such material to the public, scholars, and government; and

(C) shall include at least 1 professional historian and 1 attorney.

(c) SECURITY CLEARANCES. – (1) All Review Board nominees shall be granted the necessary security clearance in an accelerated manner subject to the standard procedures for granting such clearances.

(2) All nominees shall qualify for the necessary security clearance prior to being considered for confirmation by the Committee on Governmental Affairs of the Senate.

(d) CONFIRMATION HEARINGS. – (1) The Committee on Governmental Affairs of the Senate shall hold confirmation hearings within 30 days in which the Senate is in session after the nomination of 3 Review Board members.

(2) The Committee on Governmental Affairs shall vote on the nominations within 14 days in which the Senate is in session after the confirmation hearings, and shall report its results to the full Senate immediately.

(3) The Senate shall vote on each nominee to confirm or reject within 14 days in which the Senate is in session after reported by the Committee on Governmental Affairs.

(e) VACANCY. – A vacancy on the Review Board shall be filled in the same manner as specified for original

appointment within 30 days of the occurrence of the vacancy.

(f) CHAIRPERSON. – The Members of the Review Board shall elect one of its members as chairperson at its initial meeting.

(g) REMOVAL OF REVIEW BOARD MEMBER. – (1) No member of the Review Board shall be removed from office, other than –

(A) by impeachment and conviction; or

(B) by the action of the President for inefficiency, neglect of duty, malfeasance in office, physical disability, mental incapacity, or any other condition that substantially impairs the performance of the member's duties.

(2)(A) If a member of the Review Board is removed from office, and that removal is by the President, not later than 10 days after the removal the President shall submit to the Committee on Government Operations of the House of Representatives and the Committee on Governmental Affairs of the Senate a report specifying the facts found and the grounds for the removal.

(B) The President shall publish in the Federal Register a report submitted under paragraph (2)(A), except that the President may, if necessary to protect the rights of a person named in the report or to prevent undue interference with any pending prosecution, postpone or refrain from publishing any or all of the report until the completion of such pending cases or pursuant to privacy protection requirements in law.

(3)(A) A member of the Review Board removed from office may obtain judicial review of the removal in a civil action commenced in the United States District Court for the District of Columbia.

(B) The member may be reinstated or granted other appropriate relief by order of the court.

(h) COMPENSATION OF MEMBERS. – (1) A member of the Review Board shall be compensated at a rate equal to the daily equivalent of the annual rate of basic pay prescribed for level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day (including travel time) during which the member is engaged in the performance of the duties of the Review Board.

(2) A member of the Review Board shall be allowed reasonable travel expenses, including per diem in lieu of subsistence, at rates for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from the member's home or regular place of business in the performance of services for the Review Board.

(i) DUTIES OF THE REVIEW BOARD. – (1) The Review Board shall consider and render decisions on a determination by a Government office to seek to postpone the disclosure of assassination records.

(2) In carrying out paragraph (1), the Review Board shall consider and render decisions –

(A) whether a record constitutes an assassination record; and

(B) whether an assassination record or particular information in a record qualifies for postponement of disclosure under this Act.

(j) POWERS. – (1) The Review board shall have the authority to act in a manner prescribed under this Act including authority to –

(A) direct Government offices to complete identification aids and organize assassination records;

(B) direct Government offices to transmit to the Archivist; assassination records as required under this Act, including segregable portions of assassination records, and substitutes and summaries of assassination records that can be publicly disclosed to the fullest extent;

(C)(i) obtain access to assassination records that have been identified and organized by a Government office;

(ii) direct a Government office to make available to the Review Board, and if necessary investigate the facts surrounding, additional information, records, or testimony from individuals, which the Review Board has reason to believe is required to fulfill its functions and responsibilities under this Act; and

(iii) request the Attorney General to subpoena private persons to compel testimony, records, and other information relevant to its responsibilities under this Act;

(D) require any Government office to account in writing for the destruction of any records relating to the assassination of President John F. Kennedy;

(E) receive information from the public regarding the identification and public disclosure of assassination records; and

(F) hold hearings, administer oaths, and subpoena witnesses and documents.

(2) A subpoena issued under paragraph (1)(C)(iii) may be enforced by any appropriate Federal court acting pursuant to a lawful request of the review board.

(k) WITNESS IMMUNITY. – The Review Board shall be considered to be an agency of the United States for purposes of section 6001 of title 18, United States Code.

(l) OVERSIGHT. – (1) The Committee on Government Operations of the House of Representatives and the Committee on Governmental Affairs of the Senate shall have continuing oversight jurisdiction with respect to the official conduct of the Review Board and the disposition of postponed records after termination of the Review Board, and shall have access to any records held or created by the Review Board.

(2) The Review Board shall have the duty to cooperate with the exercise of such oversight jurisdiction.

(m) SUPPORT SERVICES. – The Administrator of the General Services Administration shall provide administrative services for the Review Board on a reimbursable basis.

(n) INTERPRETIVE REGULATIONS. – The Review Board may issue interpretive regulations.

(o) TERMINATION AND WINDING UP. – (1) The Review Board and the terms of its members shall terminate not later than 2 years after the date of enactment of this Act,

except that the Review Board may, by majority vote, extend its term for an additional 1-year period if it has not completed its work within that 2-year period.

(2) Upon its termination, the Review Board shall submit reports to the President and the Congress including a complete and accurate accounting of expenditures during its existence, and shall complete all other reporting requirements under this Act.

(3) Upon termination and winding up, the Review Board shall transfer all of its records to the Archivist for inclusion in the Collection, and no record of the Review Board shall be destroyed.

SEC. 8 ASSASSINATION RECORDS REVIEW BOARD PERSONNEL.

(a) EXECUTIVE DIRECTOR. – (1) Not later than 45 days after the initial meeting of the Review Board, the Review Board shall appoint one citizen, without regard to political affiliation, to the position of Executive Director.

(2) The person appointed as Executive Director shall be a private citizen of integrity and impartiality who is a distinguished professional and who is not a present employee of any branch of the Government and has had no previous involvement with any official investigation or inquiry relating to the assassination of President John F. Kennedy.

(3)(A) A candidate for Executive Director shall be granted the necessary security clearances in an accelerated manner subject to the standard procedures for granting such clearances.

(B) A candidate shall qualify for the necessary security clearance prior to being approved by the Review Board.

(4) The Executive Director shall –

(A) serve as principal liaison to Government offices;

(B) be responsible for the administration and coordination of the Review Board's review of records;

(C) be responsible for the administration of all official activities conducted by the Review Board; and

(D) have no authority to decide or determine whether any record should be disclosed to the public or postponed for disclosure.

(5) The Executive Director shall not be removed for reasons other than by a majority vote of the Review Board for cause on the grounds of inefficiency, neglect of duty, malfeasance in office, physical disability, mental incapacity, or any other condition that substantially impairs the performance of the responsibilities of the Executive Director or the staff of the Review Board.

(b) STAFF. – (1) The Review Board may, in accordance with the civil service laws but without regard to civil service law and regulation for competitive service as defined in subchapter 1, chapter 33 of title 5, United States Code, appoint and terminate additional personnel as are necessary to enable the Review Board and its Executive Director to perform its duties.

(2) A person appointed to the staff of the Review Board shall be a private citizen of integrity and impartiality who is not a present employee of any branch of the Government and who has had no previous involvement with any official investigation or inquiry relating to the assassination of President John F. Kennedy.

(3)(A) A candidate for staff shall be granted the necessary security clearances in an accelerated manner subject to the standard procedures for granting such clearances.

(B) A candidate for the staff shall qualify for the necessary security clearance prior to being approved by the Review Board.

(c) COMPENSATION. – The Review Board shall fix the compensation of the Executive Director and other personnel in accordance with title 5, United States Code, except that the rate of pay for the Executive Director and other personnel may not exceed the rate payable for level V of the Executive schedule under section 5316 of that title.

(d) ADVISORY COMMITTEES. – (1) The Review Board shall have the authority to create advisory committees to assist in fulfilling the responsibilities of the Review Board under this Act.

(2) Any advisory committee created by the Review Board shall be subject to the Federal Advisory Committee Act (5 U.S.C. App.).

SEC. 9. REVIEW OF RECORDS BY THE ASSASSINATION RECORDS REVIEW BOARD.

(a) CUSTODY OF RECORDS REVIEWED BY BOARD. – Pending the outcome of the Review Board's review activity, a Government office shall retain custody of its assassination records for purposes of preservation, security, and efficiency, unless –

(1) the Review Board requires the physical transfer of records for reasons of conducting an independent and impartial review; or

(2) such transfer is necessary for an administrative hearing or other official Review Board function.

(b) STARTUP REQUIREMENTS. – The Review Board shall –

(1) not later than 90 days after the date of its appointment, publish a schedule for review of all assassination records in the Federal Register; and

(2) not later than 180 days after the date of enactment of this Act, begin its review of assassination records under this Act.

(c) DETERMINATIONS OF THE REVIEW BOARD. – (1) The Review Board shall direct that all assassination records be transmitted to the Archivist and disclosed to the public in the Collection in the absence of clear and convincing evidence that –

(A) a Government record is not an assassination record, or

(B) a Government record or particular information within an assassination record qualifies for postponement of public disclosure under this Act.

(2) In approving postponement of public disclosure of an assassination record, the Review board shall seek to –

(A) provide for the disclosure of segregable parts, substitutes, or summaries of such a record; and

(B) determine, in consultation with the originating body and consistent with the standards for postponement under this Act, which of the following alternative forms of disclosure shall be made by the originating body:

(i) Any reasonably segregable particular information in an assassination record.

(ii) A substitute record for that information which is postponed.

(iii) A summary of an assassination record.

(3) With respect to each assassination record or particular information in assassination records the public disclosure of which is postponed pursuant to section 6, or for which only substitutions or summaries have been disclosed to the public, the Review Board shall create a transmit to the Archivist a report containing –

(A) a description of action by the Review Board, the originating body, the President, or any Government office (including a justification of any such action to postpone disclosure of any record or part of any record) and of any official proceedings conducted by the Review Board with regard to specific assassination records; and

(B) a statement, based on a review of the proceedings and in conformity with the decisions reflected therein, designating a recommended specified time at which or a specified occurrence following

which the material may be appropriately disclosed to the public under this Act.

(4)(A) Following its review and a determination that an assassination record shall be publicly disclosed in the Collection or postponed for disclosure and held in the protected Collection, the Review Board shall notify the head of the originating body of its determination and publish a copy of the determination in the Federal Register within 14 days after the determination is made.

(B) Contemporaneous notice shall be made to the President for Review Board determinations regarding executive branch assassination records, and to the oversight committees designated in this Act in the case of legislative branch records. Such notice shall contain a written unclassified justification for public disclosure or postponement of disclosure, including an explanation of the application of any standards contained in section 6.

(d) PRESIDENTIAL AUTHORITY OVER REVIEW BOARD DETERMINATION. –

(1) PUBLIC DISCLOSURE OR POSTPONEMENT OF DISCLOSURE. – After the Review Board has made a formal determination concerning the public disclosure or postponement of disclosure of an executive branch assassination record or information within such a record, or of any information contained in an assassination record, obtained or developed solely within the executive branch, the President shall have the sole and nondelegable authority to require the disclosure or postponement of such record or information under the standards set forth in section 6, and the president shall provide the Review Board with an unclassified written certification specifying the President's decision within 30 days after the Review

Board's determination and notice to the executive branch agency as required under this Act, stating the justification for the president's decision, including the applicable grounds for postponement under section 6, accompanied by a copy of the identification aid required under section 4.

(2) PERIODIC REVIEW. – Any executive branch assassination record postponed by the President shall be subject to the requirements of periodic review, downgrading and declassification of classified information, and public disclosure in the collection set forth in section 4.

(3) RECORD OF PRESIDENTIAL POSTPONEMENT. – The Review Board shall, upon its receipt, publish in the Federal Register a copy of any unclassified written certification, statement, and other materials transmitted by or on behalf of the President with regard to postponement of assassination records.

(e) NOTICE TO PUBLIC. – Every 30 calendar days, beginning on the date that is 60 calendar days after the date on which the Review Board first approves the postponement of disclosure of an assassination record, the Review Board shall publish in the Federal Register a notice that summarizes the postponements approved by the Review Board or initiated by the President, the House of Representatives, or the Senate, including a description of the subject, originating agency, length or other physical description, and each ground for postponement that is relied upon.

(f) REPORTS BY THE REVIEW BOARD. – (1) The Review Board shall report its activities to the leadership of the Congress, the Committee on Government Operations of

the House of Representatives, the Committee on Governmental Affairs of the Senate, the President, the Archivist, and the head of any Government office whose records have been the subject of Review Board activity.

(2) The first report shall be issued on the date that is 1 year after the date of enactment of this Act, and subsequent reports every 12 months thereafter until termination of the Review Board.

(3) A report under paragraph (1) shall include the following information:

(A) A financial report of the expenses for all official activities and requirements of the Review Board and its personnel.

(B) The progress made on review, transmission to the Archivist, and public disclosure of assassination records.

(C) The estimated time and volume of assassination records involved in the completion of the Review Board's performance under this Act.

(D) Any special problems, including requests and the level of cooperation of Government offices, with regard to the ability of the Review Board to operate as required by this Act.

(E) A record of review activities, including a record of postponement decisions by the Review Board or other related actions authorized by this Act, and a record of the volume of records reviewed and postponed.

(F) Suggestions and requests to Congress for additional legislative authority needs.

(G) An appendix containing copies of reports of postponed records to the Archivist required under

section 9(c)(3) made since the date of the preceding report under this subsection.

(4) At least 90 calendar days before completing its work, the Review Board shall provide written notice to the President and Congress of its intention to terminate its operations at a specified date.

SEC. 10. DISCLOSURE OF OTHER MATERIALS AND ADDITIONAL STUDY.

(a) MATERIALS UNDER SEAL OF COURT. –

(1) The Review Board may request the Attorney General to petition any court in the United States or abroad to release any information relevant to the assassination of President John F. Kennedy that is held under seal of the court.

(2)(A) The Review Board may request the Attorney General to petition any court in the United States to release any information relevant to the assassination of President John F. Kennedy that is held under the injunction of secrecy of a grand jury.

(B) A request for disclosure of assassination materials under this Act shall be deemed to constitute a showing of particularized need under Rule 6 of the Federal Rules of Criminal Procedure.

(b) SENSE OF CONGRESS. – It is the sense of Congress that –

(1) the Attorney General should assist the Review Board in good faith to unseal any records that the Review Board determines to be relevant and

held under seal by a court or under the injunction of secrecy of a grand jury;

(2) the Secretary of State should contact the Government of the Republic of Russia and seek the disclosure of all records of the government of the former Soviet Union, including the records of the Komitet Gosudarstvennoy Bezopasnosti (KGB) and the Glaynoye Razvedyvatelnoye Upravleniye (GRU), relevant to the assassination of President Kennedy, and contact any other foreign government that may hold information relevant to the assassination of President Kennedy and seek disclosure of such information; and

(3) all executive agencies should cooperate in full with the Review Board to seek the disclosure of all information relevant to the assassination of President John F. Kennedy consistent with the public interest.

SEC. 11. RULES OF CONSTRUCTION.

(a) PRECEDENCE OVER OTHER LAW. – When this Act requires transmission of a record to the Archivist of public disclosure, it shall take precedence over any other law (except section 6103 of the Internal Revenue Code), judicial decision construing such law, or common law doctrine that would otherwise prohibit such transmission or disclosure, with the exception of deeds governing access to or transfer or release of gifts and donations of records to the United States Government.

(b) FREEDOM OF INFORMATION ACT. – Nothing in this Act shall be construed to eliminate or limit any right to file requests with any executive agency or seek judicial

review of the decisions pursuant to section 552 of title 5, United States Code.

(c) JUDICIAL REVIEW. – Nothing in this Act shall be construed to preclude judicial review, under chapter 7 of title 5, United States Code, of final actions taken or required to be taken under this Act.

(d) EXISTING AUTHORITY. – Nothing in this Act revokes or limits the existing authority of the president, any executive agency, the Senate, or the House of Representatives, or any other entity of the Government to publicly disclose records in its possession.

(e) RULES OF THE SENATE AND HOUSE OF REPRESENTATIVES. – To the extent that any provision of this Act establishes a procedure to be followed in the Senate or the House of Representatives, such provision is adopted –

(1) as an exercise of the rulemaking power of the Senate and House of Representatives, respectively, and is deemed to be part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House, and it supersedes other rules only to the extent that it is inconsistent with such rules; and

(2) with full recognition of the constitutional rights of either House to change the rules (so far as they relate to the procedure of the House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

SEC. 12. TERMINATION OF EFFECT OF ACT.

(a) PROVISIONS PERTAINING TO THE REVIEW BOARD. – The provisions of this Act that pertain to the appointment and

operation of the Review Board shall cease to be effective when the Review Board and the terms of its members have terminated pursuant to section 7(o).

(b) OTHER PROVISIONS. – The remaining provisions of this Act shall continue in effect until such time as the Archivist certifies to the President and the Congress that all assassination records have been made available to the public in accordance with this Act.

SEC. 13. AUTHORIZATION OF APPROPRIATIONS.

(a) IN GENERAL. – There are authorized to be appropriated such sums as are necessary to carry out this Act, to remain available until expended.

(b) INTERIM FUNDING. – Until such time as funds are appropriated pursuant to subsection (a), the President may use such sums as are available for discretionary use to carry out this Act.

SEC. 14. SEVERABILITY.

If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application of that provision to other persons not similarly situated or to other circumstances shall not be affected by the invalidation.

Approved October 26, 1992.

PART 1400 – GUIDANCE FOR INTERPRETATION AND IMPLEMENTATION OF THE PRESIDENT JOHN F. KENNEDY ASSASSINATION RECORDS COLLECTION ACT OF 1992 (JFK ACT)

Sec.

1400.1 Scope of assassination record.

1400.2 Scope of additional records and information.

1400.3 Sources of assassination records and additional records and information.

1400.4 Types of materials included in scope of assassination record and additional records and information.

1400.5 Requirement that assassination records be released in their entirety.

1400.6 Originals and copies.

1400.7 Additional guidance.

1400.8 Implementing the JFK Act – Notice of Assassination Record Designation.

AUTHORITY: 44 U.S.C. 2107.

SOURCE: 60 FR 33349, June 28, 1996, unless otherwise noted.

§ 1400.1 Scope of assassination record.

(a) An *assassination record* includes, but is not limited to, all records, public and private, regardless of how labeled or identified, that document, describe, report on, analyze or interpret activities, persons, or events reasonably related to the assassination of President John F.

Kennedy and investigations of or inquiries into the assassination.

(b) An *assassination record* further includes, without limitation:

(1) All records as defined in Section 3(2) of the JFK Act;

(2) All records collected by or segregated by all Federal, state, and local government agencies in conjunction with any investigation or analysis of or inquiry into the assassination of President Kennedy (for example, any intra-agency investigation or analysis of or inquiry into the assassination; any inter-agency communication regarding the assassination: any request by the House Select Committee on Assassinations to collect documents and other materials; or any inter- or intra-agency collection or segregation of documents and other materials);

(3) Other records or groups of records listed in the Notice of Assassination Record Designation, as described § 1400.8 of this chapter.

§ 1400.2 Scope of additional record and information.

The term *additional records and information* includes:

(a) All documents used by government offices and agencies during the declassification review of assassination records as well as all other documents indices, and other material (including but not limited to those that disclose cryptonyms, code names, or other identifiers that appear in assassination Records) that the Assassination Records Review Board (Review Board) has a reasonable basis to believe may constitute an assassination record

would assist in the identification, evaluation or interpretation of an assassination record. The Review Board will identify in writing those records and other materials it intends to seek under this section.

(b) All training manuals, instructional materials, and guidelines created or used by the agencies in furtherance of their review of assassination records.

(c) All records, lists, and documents describing the procedure by which the agencies identified or selected assassination records for review.

(d) Organizational charts of government agencies.

(e) Records necessary and sufficient to describe the agency's:

(1) Records policies and schedules;

(2) Filing systems and organization;

(3) Storage facilities and locations;

(4) Indexing symbols, marks, codes, instructions, guidelines, methods, and procedures;

(5) Search methods and procedures used in the performance of the agencies' duties under the JKF Act; and

(6) Reclassification to a higher level transfer, destruction, or other information (*e.g.*, theft) regarding the status of assassination records.

(f) Any other record that does and fall within the scope of assassination record as described in § 1400.1, but which has the potential to enhance, enrich, and broaden the historical record of the assassination.

§ 1400.3 Sources of assassination records and additional records and information.

Assassination records and additional records and information may be located at, or under the control of, without limitation:

(a) Agencies, offices, and entities of the executing, legislative, and judicial branches of the Federal Government;

(b) Agencies, offices, and entities of the executive legislative, and judicial branches of state and local governments;

(c) Record repositories and archives of Federal, state, and local governments, including presidential libraries;

(d) Record repositories and archives of universities, libraries, historical societies, and other similar organizations;

(e) Individuals who possess such records by virtue of service with a government agency, office, or entity;

(f) Persons, including individuals and corporations, who has obtained such records from sources identified in paragraphs (a) through (e) of this section;

(g) Persons, including individuals and corporations, who have themselves created or have obtained such records from sources other than those identified in paragraphs (a) through (e) of this section;

(h) Federal, state, and local courts where such records are being held under seal; or

(i) Foreign governments.

§ 1400.4 Types of materials included in scope of assassination record and additional records and information.

The term *record* in *assassination record* and *additional records and information* includes, for purposes of interpreting and implementing the JFK Act:

(a) papers, maps, and other documentary material;

(b) photographs;

(c) motion pictures;

(d) sound and video recordings;

(e) machine readable information in any form; and

(f) Artifacts.

§ 1400.5 Requirement that assassination records be released in their entirety.

An assassination record shall be released in its entirety except for portions specifically postponed pursuant to the grounds for postponement of public disclosure of records established in § 2107.6 of the JFK Act, and no portion of any assassination record shall be withheld from public disclosure solely on grounds of nonrelevance unless, in the Review Board's sole discretion, release of part of a record is sufficient to comply with the intent and purposes of the JFK Act.

§ 1400.6 Originals and copies.

(a) For purposes of determining whether originals or copies of assassination records will be made part of the

President John F. Kennedy Assassination Records Collection (JFK Assassination Records Collection) established under the JFK Act, the following shall apply:

(1) In the case of papers, maps, and other documentary materials, the Review Board may determine that record copies of government records, either the signed original, original production or a reproduction that has been treated as the official record maintained to chronicle government functions or activities, may be placed in the JFK Assassination Records Collection;

(2) In the case of other papers, maps, and other documentary material, the Review Board may determine that a true and accurate copy of a record in lien of the original may be placed in the JFK Assassination Records Collection;

(3) In the case of photographs, the original negative, whenever available (otherwise, the earliest generation print that is a true and accurate copy), may be placed in the JFK Assassination Records Collection;

(4) In the case or motion pictures, the camera original, whenever available (otherwise, the earliest generation print that is a true and accurate copy), may be placed in the JFK Assassination Records Collection;

(5) In the case of sound and video recordings, the original recording, whenever available (otherwise, the earliest generation copy that is a true and accurate copy), may be placed in the JFK Assassination Records Collection;

(6) In the case of machine-readable information, a true and accurate copy of the original (duplicating all

information contained in the original and in a format that permits retrieval of the information), may be placed in the JFK Assassination Records Collection; and

(7) In the case of artifacts, the original objects themselves may be placed in the JFK Assassination Records Collection.

(b) To the extent records from foreign governments are included in the JFK Assassination Records Collection, copies of the original records shall be sufficient for inclusion in the collection.

(c) In cases where a copy, as defined in paragraph (a) of this section, is authorized by the Review Board to be included in the JFK Assassination Records Collection, the Review Board may require that a copy be certified if, in its discretion, it determines a certification to be necessary to ensure the integrity of the JFK Assassination Records Collection. In cases where an original, as defined in paragraph (a) of this section, is required for inclusion in the JKF Assassination Records Collection, the Review Board may, at its discretion, accept the best available copy. In such cases that records included in the JKF Assassination Records Collection, whether originals or copies, contain illegible portions, such records shall have attached thereto a certified transcription of the illegible language to the extent practicable.

(d) For purposes of implementing the JFK Act, the term *copy* means a true and accurate photocopy duplication by a means appropriate to the medium of the original record that preserves and displays the integrity of the record and the information contained in it.

(e) Nothing in this section shall be interpreted to suggest that additional copies of any assassination records contained in the JFK Assassination Records Collection are not also assassination records that, at the Review Board's discretion, may also be placed in the JFK Assassination Records Collection.

(f) Nothing in this section shall be interpreted to prevent or to preclude copies of any electronic assassination records from being reformatted electronically in order to conform to different hardward [sic] and/or software requirements of audiovisual or machine readable formats if such is the professional judgment of the National Archives and Records Administration.

§ 1400.7 Additional guidance.

(a) A government agency, office or entity includes, for purposes of interpreting and implementing the JFK Act, all current, past, and former departments, agencies, offices, divisions, foreign offices, bureaus, and deliberative bodies of any Federal, state or local government and includes all inter- or intra-agency working groups, committees, and meetings that possess or created records relating to the assassination of President John F. Kennedy.

(b) The inclusion of artifacts in the scope of the term assassination records is understood to apply solely to the JFK Assassination Records Collection and to implement fully the terms of the JFK Act and has no direct or indirect bearing on the interpretation or implementation of any other statute or regulation.

(c) Whenever artifacts are included in the JFK Assassination Records Collection., it shall be sufficient to comply with the JFK Act if the public is provided access to photographs, drawings or similar materials depicting the artifacts. Additional display of or examination by the public or artifacts in the JFK Assassination Records Collection shall occur under the terms and conditions established by the National Archives and Records Administration to ensure their preservation and protection for posterity.

(d) The terms and, or, any, all, and the plural and singular forms of nouns shall be understood in their broadest and most inclusive sense and shall not be understood to be terms of limitation.

(e) Unless the Review Board in its sole discretion directs otherwise records that are identified with respect to a particular person shall include all records relating to that person that use or reflect the true name or any other name, pseudonym, codeword, symbol number, cryptonym, or alias used to identify that person.

(f) Unless the Review Board in its sole discretion directs otherwise, records that are identified by the Review Board with respect to a particular operation or program shall include all records, pertaining to that program by any other name, pseudonym, codeword, symbol, number, or cryptonym.

§ 1400.8. Implementing the JFK Act – Notice of Assassination Record Designation.

(a) A Notice of Assassination Record Designation (NARD) shall be the mechanism for the Review Board to announce publicly its determination that a record or group of records meets the definition of assassination records.

(b) Notice of all NARDs will be published in the FEDERAL REGISTER within 30 days of the decision to designate such records as assassination records.

(c) In determining to designate such records as assassination records, the Review Board must determine that the record or group of record [sic] will more likely than not enhance, enrich, and broaden the historical record of the assassination.

Supreme Court, U.S.
FILED
APR 10 1998
CLERK

No. 97-1145

In the Supreme Court of the United States

OCTOBER TERM, 1997

HARRY F. CONNICK, PETITIONER

v.

UNITED STATES OF AMERICA, ON BEHALF OF THE ASSASSINATION RECORDS REVIEW BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
FRANK W. HUNGER
Assistant Attorney General
LEONARD SCHAITMAN
FRANK A. ROSENFELD
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

1998

QUESTION PRESENTED

Whether the Attorney General, on behalf of the Assassination Records Review Board, may obtain by subpoena from the district attorney of New Orleans the original copies of the records of the district attorney relating to the assassination of President Kennedy, including that office's investigation and prosecution of Clay Shaw.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Burlington Northern R.R. v. *Office of Inspector General*, 983 F.2d 631 (5th Cir. 1993)	8
EEOC, In re, 709 F.2d 392 (5th Cir. 1983)	8-9
EEOC v. *Kloster Cruise Ltd.*, 939 F.2d 920 (11th Cir. 1991)	8
Endicott Johnson Corp. v. *Perkins*, 317 U.S. 501 (1943)	8
FTC v. *Carter*, 636 F.2d 781 (D.C. Cir. 1980)	8
FTC v. *Texaco, Inc.*, 555 F.2d 862 (D.C. Cir.), cert. denied, 431 U.S. 974 (1977)	8
Office of Inspector General, In re, 933 F.2d 276 (5th Cir. 1991)	8
United States v. *Aero Mayflower Transit Co.*, 831 F.2d 1142 (D.C. Cir. 1987)	8
United States v. *Morton Salt Co.*, 338 U.S. 632 (1950)	8
United States v. *Powell*, 379 U.S. 48 (1964)	8
United States v. *Stuart*, 489 U.S. 353 (1989)	7-8

Statutes and regulation:

President John F. Kennedy Assassination Records Collection Act of 1992, Pub. L. No. 102-526, §§ 1-14, 106 Stat. 3443-3458, as amended, Pub. L. No. 103-345, §§ 2-5, 108 Stat. 3128-3130	2
§ 3(2)	2, 9, 10
§ 3(2)(E)	2, 9

Statutes and regulation—Continued: Page

§ 3(2)(L) 2, 9
§ 3(5)(A) 3
§ 3(10) 3
§ 4(a)(1) 2
§ 4(b) 2
§ 7(a) 3
§ 7(i) 3, 11
§ 7(j) 11
§ 7(j)(1)(B) 3
§ 7(j)(1)(C)(i) 3, 11, 12
§ 7(j)(1)(C)(ii) 3, 11, 12
§ 7(j)(1)(C)(iii) 3, 5, 11, 12
§ 11(A) 14
44 U.S.C. 2107 note 2
Tucker Act, 28 U.S.C. 1491 14
36 C.F.R. 1400.7 (1996) 7

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1145

HARRY F. CONNICK, PETITIONER

v.

UNITED STATES OF AMERICA, ON BEHALF OF THE ASSASSINATION RECORDS REVIEW BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is reported at 124 F.3d 718. The opinion of the district court (Pet. App. 8-10) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 1997. The petition for a writ of certiorari was filed on January 8, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1992, Congress enacted the President John F. Kennedy Assassination Records Collection Act

of 1992 (the Act or the JFK Act).[1] Section 4(a)(1) of the Act requires the National Archives and Records Administration to "commence establishment of a collection of records to be known as the President John F. Kennedy Assassination Records Collection." The Collection is to include "[a]ll assassination records." *Id.* § 4(b). Section 3(2) of the Act defines "assassination record" as:

> a record that is related to the assassination of President John F. Kennedy, that was created or made available for use by, obtained by, or otherwise came into the possession of —

any one of a number of entities, including the Warren Commission, the Rockefeller Commission on Central Intelligence Agency activity and "(E) the Select Committee on Assassinations (the 'House Assassinations Committee') of the House of Representatives." The definition also includes "(L) any State or local law enforcement office that provided support or assistance or performed work in connection with a Federal inquiry into the assassination of President John F. Kennedy." Congress defined the "public interest" being served to be the

> compelling interest in the prompt public disclosure of assassination records for historical and governmental purposes and for the purpose of fully informing the American people about the history

---

[1] Pub. L. No. 102-526, §§ 1-14, 106 Stat. 3443-3458, as amended, Pub. L. No. 103-345, §§ 2-5, 108 Stat. 3128-3130, codified at 44 U.S.C. 2107 note. For ease of reference, all citations to the Act will be to the sections of the Public Law, which has been reproduced in the petition appendix. See Pet. App. 13-45.

> surrounding the assassination of President John F. Kennedy.

Id. § 3(10).

Section 7(a) establishes an independent agency within the Executive Branch known as the Assassination Records Review Board (Board) to manage the collection of documents within the scope of those sought to be preserved under the Act. The Board has the duty under Section 7(i) to "consider and render decisions on a determination by a Government office to seek to postpone the disclosure of assassination records." The Board also has a number of specified powers, including the authority to "direct Government offices to transmit to the Archivist assassination records as required under this Act," § 7(j)(1)(B), and to "obtain access to assassination records that have been identified and organized by a Government office," § 7(j)(1)(C)(i). The Act expressly defines the House Assassinations Committee (which is no longer in existence) as a "Government office." *Id.* § 3(5)(A). The Board also has the authority to:

> direct a Government office to make available to the Review Board, and if necessary investigate the facts surrounding, additional information, records, or testimony from individuals, which the Review Board has reason to believe is required to fulfill its functions and responsibilities under this Act.

§ 7(j)(1)(C)(ii). The Board is authorized to:

> request the Attorney General to subpoena private persons to compel testimony, records, and other information relevant to its responsibilities under this Act.

§ 7(j)(1)(C)(iii).

2. Petitioner, in his official capacity as the District Attorney for the Parish of Orleans, Louisiana, has for many years been in possession of records of the former Orleans Parish District Attorney, Jim Garrison, relating to Mr. Garrison's prosecution of Clay Shaw for his alleged participation in the assassination of President Kennedy. On March 20, 1978, petitioner made those records available for review by Martin J. Daly, an investigator for the Select Committee on Assassinations of the U.S. House of Representatives (House Assassinations Committee) pursuant to its congressionally-authorized investigation into the assassination of President Kennedy. Petitioner's chief investigator informed Mr. Daly that "he had in his office a (5) five drawer file cabinet containing papers, tapes, statements and interviews pertaining to the original investigation [of Clay Shaw]." U.S. R. E. No. 3, ¶ 5. Mr. Daly reviewed these files, copied 12 documents and brought them back to Washington, D.C. *Ibid.* Two other staff members of the House Assassinations Committee reviewed these same files in April or May 1978. *Id.* ¶¶ 6-7. Those staff members inspected the assassination records in petitioner's offices and made notes and indices of their contents. *Ibid.*, with exhibits.

In June 1995, the Board verified that petitioner still had the records that had been reviewed by the House Assassinations Committee. U.S. R. E. No. 1, ¶¶ 3-10. On June 27, 1995, the Review Board's representative, Thomas Samoluk, personally reviewed the same five file drawers of material, confirming that they appeared to be the same records reviewed by the House Assassinations Committee staff in 1978. *Id.* ¶¶ 9-10. At that time, petitioner assured Mr. Samoluk that he would donate the files to the JFK Assassination

Records Collection, with the exception of the grand jury records. *Id.* ¶ 7. However, between June 1995 and January 1996, the Review Board attempted, without success, to have petitioner produce the records. Connick R. E. No. 5, ¶ 16.

On January 29, 1996, at the request of the Board and pursuant to Section 7(j)(1)(C)(iii) of the Act, Assistant Attorney General Frank W. Hunger issued a subpoena duces tecum to petitioner, requiring him to appear and testify, under oath, regarding: "any records relating to the assassination of President John F. Kennedy, including, but not limited to, any records relating to the investigation and prosecution of Mr. Clay Shaw by the former New Orleans District Attorney, Jim Garrison." Pet. App. 5. The subpoena also required the production of:

> all documents and records in your possession, custody or control relating to the assassination of President John F. Kennedy, including, but not limited to handwritten notes, memoranda, drawings, photographs, tape recordings, and correspondence that relate to the investigation and prosecution of Mr. Clay Shaw by former New Orleans District Attorney, Jim Garrison, with the exception of any grand jury materials still extant in the possession of the District Attorney's Office.

Id. at 7.

3. On February 15, 1996, the day before its return date, petitioner filed a Motion to Quash the subpoena in the United States District Court for the Eastern District of Louisiana. On March 7, 1996, the United States filed a Petition for Summary Enforcement of Administrative Subpoena with that court. Those two matters were then consolidated. The district court

instructed petitioner to allow the Board to inspect the records that were the subject of the subpoena so that the Board could determine whether it needed the original records in petitioner's possession or whether copies would suffice. U.S. R. E. No. 5, at 1-2. After that inspection, the Board determined that the originals of all such records needed to be transferred to the National Archives to be preserved under the best archival conditions possible, because the conditions under which they were being stored in petitioner's possession put them at continuing risk of deterioration or damage. U.S. R. E. No. 6, at 4.[2]

The United States then renewed its motion for enforcement of the subpoena. U.S. R. E. Nos. 4-5. On June 25, 1996, the district court issued an order and judgment, granting the government's petition to enforce the subpoena in part. Pet. App. 8-9. The court

---

[2] Two representatives of the Board inspected the records in New Orleans on April 26, 1996. U.S. R. E. No. 6. Those two representatives, both highly qualified archivists and historians (see *id.* ¶¶ 1-11), presented three reasons why the records should be turned over to the Board as soon as possible. First, the order of the records had been seriously disturbed since the 1978 inspection by the House Assassinations Committee, and even since June 1995, making it difficult to determine whether records had been lost, removed or filed indifferently. *Id.* ¶ 15.a. Second, only three-and-one-half file drawers were produced, not five, which further raised the question whether some records may now be missing. *Id.* ¶ 15.b. Third, the audio tapes had not been stored under appropriate archival conditions, making it likely that further deterioration in those valuable artifacts would occur. *Id.* ¶ 15.c. The Board representatives recommended that those records be processed by an archival facility that is equipped to deal with them, *id.* ¶ 16, and stated that there is no facility in the United States better equipped to carry out that task than the National Archives. *Id.* ¶ 17.

ordered petitioner to "turn over to the [United States] the originals of all records in his possession that are described in the Administrative Subpoena * * *; PROVIDED, HOWEVER, that [the United States] shall make clear and legible copies of each record * * * and provide such copies to [petitioner]." *Id.* at 9.

4. The court of appeals affirmed. Pet. App. 1-4. First, the court of appeals held that the records "are assassination records within the meaning and intendment of the Act" because they "indisputably are related to the assassination of President Kennedy" and because "a representative of the Select Committee on Assassinations traveled to New Orleans in 1978 and, with the consent of [petitioner], inspected, indexed, and photocopied portions of those records." *Id.* at 3. Next, the court of appeals held that petitioner "holds a government office within the intendment of the Act" because the Board's regulations define "government office" to include state and local government. *Ibid.* (citing 36 C.F.R. 1400.7 (1996)). Thus, the court held, petitioner "is obligated to transfer all assassination records in his possession to the National Archives." Pet. App. 3.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Indeed, the issue raised here has never before been presented in any litigation.

1. This case involves an attempt to enforce an administrative subpoena. The scope of a district court's inquiry in a proceeding to enforce an administrative subpoena is limited. *United States* v. *Stuart*,

489 U.S. 353, 359-360 (1989); *EEOC* v. *Kloster Cruise Ltd.*, 939 F.2d 920, 922 (11th Cir. 1991); *In re Office of Inspector General*, 933 F.2d 276, 277 (5th Cir. 1991). Though the test for enforcement has been phrased in various ways, the requirements to justify judicial enforcement of an administrative subpoena are "minimal," *e.g.*, *Burlington Northern R.R.* v. *Office of Inspector General*, 983 F.2d 631, 637 (5th Cir. 1993), and the proceedings are summary in nature, *United States* v. *Aero Mayflower Transit Co.*, 831 F.2d 1142, 1145-1147 (D.C. Cir. 1987). The district court's inquiry is essentially limited to three broad questions: (1) whether the records investigation is for a proper statutory purpose; (2) whether the documents the agency seeks are relevant to the records investigation; and (3) whether the demand for documents is unreasonably broad or burdensome. See, *e.g.*, *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652-653 (1950); *Burlington Northern*, 983 F.2d at 637-638. A district court must enforce a federal agency's investigative subpoena if it is "not plainly incompetent or irrelevant to any lawful purpose of the [agency]," *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509 (1943).[3] If the government agency satisfies that "minimal" standard, the burden then shifts to the subpoenaed party to make "a *substantial* demonstration * * * based on *meaningful* evidence" that the Court's process would be abused by enforcement. *In re EEOC*,

---

[3] Moreover, the agency's own appraisal of relevancy must be accepted so long as it is not "obviously wrong." *FTC* v. *Carter*, 636 F.2d 781, 788 (D.C. Cir. 1980) (quoting *FTC* v. *Texaco, Inc.*, 555 F.2d 862, 877 n.32 (D.C. Cir.) (en banc), cert. denied, 431 U.S. 974 (1977)).

709 F.2d 392, 400 (5th Cir. 1983). Because petitioner failed to meet that "heavy" burden, *ibid.*, the district court properly ordered the subpoena enforced.

Petitioner has not raised any dispute over whether the Shaw file is relevant to the Board's investigation or whether the subpoena is unreasonably broad or unduly burdensome. The only dispute is over legal issues, such as (1) whether the subpoenaed records are "assassination records," and thus come within the scope of the JFK Act, and (2) whether, in seeking those records by subpoena, the Board was pursuing a proper statutory purpose. On both questions, the Board's position is correct.

a. The Act defines "assassination records" as including "a record that is related to the assassination of President John F. Kennedy, that was created or *made available for use by*" various entities, specifically including the House Assassinations Committee. JFK Act § 3(2) (emphasis added). Petitioner does not dispute that in 1978, staff members of that Committee inspected the entire Shaw file in petitioner's office, made copies of at least 12 documents, and made notes from and indices of the remainder of those records. Accordingly, under Section 3(2)(E) of the Act, the records constitute "assassination records" because they were "made available for use by" the House Assassinations Committee. Alternatively, the JFK Act also defines an "assassination record" as a record created by "any State or local law enforcement office that provided support or assistance or performed work in connection with a Federal inquiry into the assassination of President John F. Kennedy." § 3(2)(L). Under that definition, the subpoenaed records also qualify as "assassination records" because petitioner's decision

to allow the House Assassination Committee investigators to study the file constituted "support or assistance" to the Committee's inquiry.

Petitioner objects, however, that the Shaw file was not created for any federal purpose, and thus ought to be excluded from the definition of "assassination record." Pet. 12-14. That argument misreads the language of the Act. The definition in Section 3(2) includes in the alternative both those records "created" by one of the named entities and those "made available for use by" them. Just because Jim Garrison created the file years earlier during his prosecution of Clay Shaw does not preclude it from meeting the statutory definition of "assassination record" when petitioner subsequently made those files "available for use by" the House investigators who reviewed that file as part of their investigation. Nor is there any merit to petitioner's alternative argument that the House Assassinations Committee's interaction with the file was somehow not sufficiently significant to constitute making the file "available for use by" that Committee. It is immaterial that the House investigators copied only 12 pages of the file, because they examined the entire file, made notes, and prepared indices of the file. As a result, any effort to identify all of the documents that were part of the House investigation must include that file. Congress deliberately chose to enact a broad definition of "assassination record" that includes documents reviewed by the listed entities (such as the Committee) from the files of other persons or institutions. Such documents are no less a part of the historical record of the Kennedy assassination and its investigations than are the docu-

ments created or retained by the listed offices themselves.

b. It follows from the conclusion that the Shaw file is an "assassination record" that the Board has the authority to obtain that file from petitioner through an administrative subpoena. The Board is authorized to "request the Attorney General to subpoena private persons to compel testimony, records, and other information relevant to its responsibilities under this Act." § 7(j)(1)(C)(iii). Petitioner contends (Pet. 14) that the Board is given only a "singular responsibility" under the Act, namely the duty under Section 7(i) to "consider and render decisions on a determination by a Government office to seek to postpone the disclosure of assassination records." But in addition to that duty, the Act gives the Board certain other powers in Section 7(j) that also come within its "responsibilities" for purposes of the statutory subpoena authority. Those powers include the authority to "obtain access to assassination records that have been identified and organized by a Government office." § 7(j)(1)(C)(i). The Board also has the authority to "direct a Government office to make available to the Review Board, and if necessary investigate the facts surrounding, additional information, records, or testimony from individuals, which the Review Board has reason to believe is required to fulfill its functions and responsibilities under this Act." § 7(j)(1)(C)(ii).

Taken together, and read in conjunction with the subpoena power, those responsibilities amply support the Board's demand for the Shaw file. Even though that file was not in the possession of the House Assassinations Committee, it is an "assassination record[] that ha[s] been identified and organized" by

the Committee under Section 7(j)(1)(C)(i). Again, the full contents of the Shaw file were studied and indexed by the Committee as part of its investigation. The file thus can reveal important information about the House Assassinations Committee's investigation, illuminating the nature of its attempts to deal with the validity or lack thereof of the prosecution of Clay Shaw. The Board thus has the authority to "obtain access to" that file under Section 7(j)(1)(C)(i) so that it can be placed in the Archives collection, both for easy public access and for safekeeping, as a record of the House Assassinations Committee investigation. Since it is not currently within the possession of the House Assassinations Committee, the Board also has the power under Section 7(j)(1)(C)(ii) to "investigate the facts surrounding" the file, since that file constitutes "additional information, records, or testimony from individuals, which the Review Board has reason to believe is required to fulfill its functions and responsibilities under this Act." That language contemplates that the task of assembling and transmitting all assassination records to the Archives may well involve persons and documents that are not currently within the possession of one of the named agencies. The subpoena power under Section 7(j)(1)(C)(iii) provides an essential tool for that investigation: compulsory process, which this subsection expressly makes available for use against "private persons" to obtain both testimony and records. The Board thus has statutory authority to require petitioner to provide records in his custody to the Board.

2. The court of appeals did not reach the second of those two questions, *i.e.*, whether the Board's subpoena properly serves to fulfill its responsibilities.

Instead, the court first found that the Shaw file constitutes an assassination record and then held that petitioner has a statutory responsibility to transmit the file to the Archives, independent of the Board's subpoena. Pet. App. 3. It reached that conclusion on the ground that the Orleans Parish District Attorney's office is a "Government office" within the terms of the Act. The United States did not rely on that argument before the district court or the court of appeals. There is no need to consider here whether the court of appeals' rationale on that point was sound, however, because the court of appeals' judgment was correct for the alternative reasons that we have outlined in this brief.

3. Petitioner objects to the district court's order requiring him to surrender the original of the subpoenaed file, with the United States having the obligation to make copies of each item and return the copies to petitioner. Petitioner asserts that this requirement exceeds the scope of ordinary subpoena practice and constitutes an unconstitutional taking. Both contentions are incorrect.

The record placed before the district court shows that there is good reason to insist that the originals be immediately provided to the Board. In 1996, two experts re-examined the file on behalf of the Board, and their uncontradicted opinions are that petitioner appears to be taking insufficient steps to preserve and safeguard the file. As they explained, the contents of the file are in a different sequence than when the House Assassinations Committee or earlier Board representatives examined it, one-and-one-half of the five drawers of material appear to be missing, and the audio tapes have not been properly stored to avoid damage. See U.S. R. E. No. 6. Under such circum-

stances, it is important for the Board to obtain the originals and to have experienced professional archivists make any copies. After the experts rendered those opinions, the district court ordered petitioner to surrender the originals. Petitioner fails to show why that requirement was reversible error.

With respect to petitioner's takings argument, that issue is not properly presented in this case. If the subpoena or its underlying statute constitute a taking, then petitioner's sole remedy would be to bring a claim for just compensation against the United States under the Tucker Act, 28 U.S.C. 1491. Congress did not intend the purposes of the JFK Act to be frustrated through reliance on property rights when it required, or otherwise authorized, the acquisition and transmittal of assassination records to the Archives. See § 11(a). If the statutory requirement that persons relinquish custody of assassination records of the Board constitutes a taking of compensable property rights, petitioner's remedy lies elsewhere; it would not permit him to resist this subpoena.

4. At any rate, the issues raised by the petition do not merit this Court's attention. They raise a unique situation, unlikely ever to arise again. There is a finite amount of Kennedy assassination records, and the Board is well on its way toward completing the task of assembling those records in the Archives. Jim Garrison's investigation and prosecution of Clay Shaw for the assassination was a singular event, unlike any other of the limited number of state and local investigations. While there may be a few additional efforts to obtain state and local law enforcement files, it is impossible to know whether any future litigation will raise similar issues. Given that

uncertainty, and the absence of any conflict among the courts of appeals on the issues presented in the petition, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
LEONARD SCHAITMAN
FRANK A. ROSENFELD
Attorneys

APRIL 1998